No.

FILED

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Supreme Court of the United States

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October Term, 1998

ANDREW HOLMES, First Lieutenant,

Petitioner,

v.

CALIFORNIA ARMY NATIONAL GUARD; TANDY BOZEMAN, Major, in his official capacity; PETE WILSON, Governor, in his official capacity; U.S. ARMY NATIONAL GUARD; UNITED STATES OF AMERICA; WILLIAM S. COHEN, Secretary of Defense,

Respondents.

RICHARD P. WATSON, Lieutenant,

Petitioner,

v.

WILLIAM J. PERRY, Secretary of Defense; JOHN DALTON, Secretary of the Navy; UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This Petition seeks review of the constitutionality of the so-called "don't ask, don't tell" policy regarding homosexuality in the armed forces. The questions presented for review by this Petition are:

I. Does A Policy Which Punishes Members Of One Class Of Individuals, Admitted Homosexuals, For Identifying Their Sexual Orientation, Violate The Equal Protection Clause?

II. Does The Government's "Don't Ask, Don't Tell" Policy, A Policy Designed To Silence Homosexuals From Identifying Their Status As Homosexuals, Constitute An Unconstitutional Prior Restraint On Free Speech?

III. Are The Courts Required To Accept Legislative Pronouncements That The "Don't Ask, Don't Tell" Policy Regulates "Conduct" Rather Than "Status" Or "Speech," In The Face Of Overwhelming Evidence That The Policy Was Designed To, And Does, Impermissibly Regulate "Status" And "Speech"?

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OPINIONS BELOW

The opinion of the court of appeals (App., A, 1a-24a) is reported at 124 F.3d 1126. The opinions of the district courts are reported, respectively, at 918 F.Supp. 1403 (W.D.Wash. 1996) (App., C, 28a-45a) (*Richard P. Watson v. William J. Perry, et al.*) and 920 F.Supp. 1510 (N.D.Cal. 1996) (App., D, 46a-81a) (*Andrew Holmes v. California Army National Guard, et al.*). The cases were consolidated for oral argument before the court of appeals, which issued a single opinion. Richard P. Watson (Lieutenant, United States Navy) and Andrew Holmes jointly file this petition for Writ of Certiorari. (All references to the consolidated cases of *Watson* and *Holmes* will be to *Holmes v. California Army National Guard.*) The findings and recommendations of each member's Board of Inquiry are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1997; petition for rehearing was denied on April 6, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First and Fifth Amendments to the United States Constitution (App., E, 82a); the relevant provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. section 706 (App., F, 83a); Section 571 of the National Defense Authorization Act of 1994, 10 U.S.C. section 654 (App., G, 84a-87a); and Department of Defense ("DoD") Directive No. 1332.30 (App., H, 88a-110a) are set forth in the Appendix.

STATEMENT OF THE CASE

This case challenges the constitutionality, both on its face and as it has been applied to petitioners, of the federal government's policy regarding military service by homosexual men and women—a policy known colloquially as "Don't Ask, Don't Tell, Don't Pursue," hereinafter "the Policy."

A. The Policy

The Policy's colloquial title is suggestive of its legislative and executive history. It did not begin its life as legislation. Rather, President Clinton at the start of his presidency stated that elimination of discrimination against homosexuals in the armed services would be a priority of his administration. Reaction in the houses of Congress—and particularly from legislators from the Southern States—was condemning. Hearings ensued, first in the House of Representatives and then in the Senate. The testimony obtained in these settings by unsympathetic and even hostile members of Congress record how the Executive branch's attempt to eliminate a particular brand of prejudice resulted in a Policy that imposed on affected service members an obligation to remain absolutely silent about their homosexuality, under any circumstance and at all times.

By operation of the Policy, a service member who speaks of his or her status as a homosexual is forced, under pain of a stigmatizing early discharge, to do no less than renounce that he or she is, in fact, a homosexual. The Policy's "don't tell" prong rendered any change in the status quo entirely illusory.

Under the Policy, whose long title is the National Defense Authorization Act of 1994 (the "Act"), a homosexual orientation, in and of itself, does not technically operate as a bar either to entry into the armed forces or to continued military service. 10 U.S.C. section 654(b)-(c) (App., G, 86a-87a). On the other hand, a service member's mere statement of status—"I am a homosexual"—immediately operates to impose on that service member an obligation, under pain of early discharge, to rebut a statutory presumption. This presumption, broad and sweeping, requires proof of a negative proposition: the service member must "demonstrate[] that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." *Id.*

On December 21, 1993, the Department of Defense ("DoD") issued two directives intended to give administrative effect to the Act. *See* DoD Dir. No. 1332.30. (App., H, 88a-110a)[1] These directives took effect

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[1] DoD Directive No. 1332.30, which was applied in the cases below to Lieutenant Watson and First Lieutenant Holmes, governs the administrative separation of regular commissioned officers. DoD Directive No. 1332.14 governs the administrative separation of enlisted personnel. The two directives are identical in all material respects.

on February 28, 1994. Like the Act, the new directives do not regard sexual orientation as a disqualification for military service. In fact, they expressly provide to the contrary: "[a] member's sexual orientation is considered a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct." DoD Dir. No. 1332.30, Enc. 2, paragraph C (App. H, 94a-96a).

In application, however, this phrasing is meaningless, since the Policy eliminates any possibility that a declared homosexual's statement will be considered anything *but* an admission of prohibited conduct, since the directives define certain "statements" to *be* "homosexual conduct." *See* DoD Dir. No. 1332.30, Enc. 2, paragraph C (App., H, 94a-96a) ("*[h]omosexual conduct includes . . . a statement* by a member that demonstrates a propensity or intent to engage in homosexual acts . . .") (emphasis added). Specifically, under DoD Directive No. 1332.30, the statement "I am homosexual" constitutes actionable "homosexual conduct." "Homosexual conduct," the linchpin of this Act and Policy, is therefore an all-encompassing non-literal term whose definition is radically broadened to include *both* "homosexual acts" *and* mere "statements" of orientation. *Id.* (App., H, 88a-110a). Thus, notwithstanding the explicit "enlightened" premise of the Act and its Directives that homosexual orientation is not a bar to continued military service, the Directives authorize discharge solely on the basis of a statement of that very orientation. *Id.* No conduct of any kind need ever be shown or established, as shown by the experiences of the service members in the instant cases. *Id.* It is by radical alterations of conventional definitions that the Policy forces a "statement of orientation" into an admission of actionable "conduct."

It is in this milieu that the Policy's use of the word "propensity" is relied on by the government to argue that it is "conduct," not "status," that the Policy regulates. *See, e.g., Holmes v. California Army National Guard.* Yet, conduct and status are, under the Policy, indistinguishable, since the words "I am homosexual," literally an admission only of status, take on an entirely new meaning. Under the Policy, "I am a homosexual" means that the speaker admits to engaging in prohibited homosexual conduct or "acts." In order to remain in the service, the speaker must then rebut the statutory presumption that he or she *does not have* the "propensity" to engage in conduct or acts. The Act does not define the term "propensity," but it defines a "homosexual

act" in broad language to mean:

> (A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and
>
> (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

Id., section 654(f)(3) (App., G, 87a).

"Propensity" is defined in the Directives:

> Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engaged in or will engage in homosexual acts.

DoD Dir. No. 1332.30, Enc. 1, paragraph 13 (App., H, 92a). Finally, the Directive specifies factors to be considered "[i]n determining whether an officer [who states that he or she is a homosexual] has successfully rebutted the [statutory] presumption," including, without limitation, evidence regarding: "(1) [w]hether the officer has engaged in homosexual acts; (2) [t]he officer's credibility; (3) [t]estimony from others about the officer's past conduct, character, and credibility; (4) [t]he nature and circumstances of the officer's statement; and (5) [a]ny other evidence relevant to whether the officer is likely to engage in homosexual acts." *Id.*, Enc. 2, paragraph C.1.b(1)-(5) (App., H, 95a). As of the time of hearing by the court below, only seven service members, men and women, had "rebutted" the presumption created by their statements of orientation; out of 845 men and women processed for discharge, these seven constituted .0083 of the total.[2]

Declared homosexuals are, by dint of the Policy, presumed to engage in prohibited conduct. This is the single distinction between the current Policy and the policy it replaced. Previously, simply the status of homosexuality was prohibited, and there was no need to impose upon the words "I am a homosexual" any particular non-literal meaning. Their mere utterance revealed a prohibited status and the speaker could be discharged. Considering that a blatant status-based exclusion could be constitutionally infirm (*see, e.g., Able v. United States*, 880 F.Supp. 968, 975 (E.D.N.Y. 1995), aff'd 968 F.Supp. 850 (E.D.N.Y. 1997), the Policy

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[2] *See* Declaration of Douglas G. Chapman (App., I, 111a-123a).

was worded in order to make those same words an admission of conduct, on the notion that "conduct" was a firmer ground upon which to exclude. *Able v. United States,* 880 F.Supp. at 976-977, aff'd 968 F.Supp. 850 (E.D.N.Y. 1997). Consider again this excerpt from the Policy's implementing regulations: "...sexual orientation is considered a personal and private matter, and does not bar entry into service or continued service, *unless manifested by homosexual conduct." Holmes v. California Army National Guard,* 124 F.3d at 1128, citing DoD Directive 1332.30 Enc. 2, paragraph C. (Emphasis added.) (App., H, 94a).

It bears re-emphasis that no conduct of any kind need ever occur and the "conduct" that gives the Policy its supposed legitimacy is entirely a creature of the Policy itself. The same words, "I am homosexual," formerly an actionable admission of a prohibited status (old policy), are now an admission of prohibited conduct (new Policy). The new Policy thus places a new and distinct meaning on identical words that under the old policy meant far less (status) than they do under the new Policy (conduct). This is a contrivance that takes aim at a particular group (admitted homosexuals), and removes from that group critical constitutional protections under both the equal protection clause of the Fifth Amendment and the First Amendment.

First, it is a violation of Equal Protection to isolate admitted homosexuals as a class, to separately regulate them, and then to discharge them for a single utterance. Furthermore, the isolating classification is rooted in the armed forces' rigid adherence to its ancient and persistent anti-homosexual bias, which is now worded to maintain that service members will react poorly to a known homosexual in their midst. Though the armed forces list a number of justifications for the exclusion, they *all* reduce to this: certain service members dislike homosexuals, and in order to avoid *their* adverse reactions, known homosexuals must be removed. This is precisely the type of antipathy that this Court has steadfastly held cannot, under any circumstance, be the basis for a government classification of human beings. *Romer v. Evans, 517* U.S. 620 (1996), *Palmore v. Sidoti,* 466 U.S. 429 (1984), *City of Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432 (1985). Classifications based on antipathy are presumptively irrational. *Cleburne, id.,* at 440.

Second, declaring as a premise that a particular status or orientation is permitted while simultaneously penalizing any who admit of the permitted status or orientation profoundly implicates the First Amendment. The Policy also operates to place a particular meaning onto those words, by transforming the simple declaration "I am a

homosexual" into an admission that the speaker will *also* engage in prohibited conduct, regardless of the speaker's actual intent by his or her words. Finally, these are content-based restrictions on speech, which require that they be strictly scrutinized by this Court.

Why should "conduct" be the keystone of this Policy? Put another way, why was so much drafting effort directed at forcing a particular meaning ("conduct") on words ("I am a homosexual") that have an obvious literal meaning ("status"). It is because the Policy's drafters understood the challenge that faced them. Long lines of precedent held that status-based exclusions are constitutionally suspect, that any government-sponsored classification drawn in deference to prejudice is presumptively invalid, and that "free speech" is a core constitutional value in our nation, and especially speech revealing one's identity or status. It was with these profound forces in mind that "conduct" was seized on as the mechanism by which to avoid the constitutionally messy entanglements that would occur if it were shown that status and speech were the explicit targets of the Policy.

The desire to silence homosexuals is paramount, and the puzzling disparity between the clear Congressional intent to keep homosexuals closeted and the statute's focus on "conduct" is clarified by the legislative record: the artifice of "conduct" was built into the Policy deliberately to shield it from attack in the courts. As the Congressional hearings preceding adoption of the Policy drew to a close, the Senate Committee sought advice regarding how to safeguard the Policy from judicial scrutiny. *See, e.g., Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Committee on Armed Services, 103d Cong., 2nd Sess., at 777* (Senator Exon worrying that courts would overturn the Policy and allow acknowledged homosexuals to serve). As the district court in *Able v. United States*, 880 F.Supp. 968, 976-977 (E.D.N.Y. 1995), aff'd 968 F.Supp. 850 (E.D.N.Y. 1997), concluded, "[o]nce Congress decided to try to get all known homosexuals out of the Services, the chief concern was to draft legislation to insure that the enactment would survive judicial review." *Able v. United States*, 880 F.Supp. 968, 976-977 (E.D.N.Y. 1995), aff'd 968 F.Supp. 850 (E.D.N.Y. 1997).

That "status" and "speech" are the true targets, and conduct no more than a contrivance, is established by the Department of Defense's own assessment of the Policy. The official report on the Policy's implementation unwittingly emphasizes the utter irrelevance of conduct in the Policy's operation:

> First, we [the Department of Defense] found that the large majority of the discharges for homosexual conduct are based on *the statement of service members who identify themselves as homosexual, as opposed to cases involving homosexual acts.* The Services believe that most of these statement cases—although not all of them—involve service members who voluntarily elected to disclose their sexual *orientation* to their peers, supervisors or commanders. (Italics added.)

Report to the Secretary of Defense: Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military, Office of the Under Secretary of Defense (Personnel and Readiness), April 1998 ("Report"), at page 2 (App., K, 133a). The Report later repeats the same point:

> In an effort to gain a better understanding of this issue, we closely studied the available information concerning the nature of homosexual discharge cases last year. This review revealed that more than 80 percent of the discharges for homosexual conduct in Fiscal Year 1997 were 'statement' cases, i.e., cases where the service member made a statement that he or she was homosexual, *as opposed to homosexual act* or marriage cases. (Italics added.)

Id., at page 5. As if this were not enough evidence that the Policy as implemented has *nothing* to do with the prevention of "conduct," the Report goes on to report the trivial number of "conduct" cases:

> It bears mentioning that, notwithstanding the recent increases, the number of discharges for homosexual *conduct* is a very small percentage of total discharges. For example, in the first year of military service, where discharge for homosexual conduct is most frequent, such discharges represented only seven-tenths of one percent [.007 per cent] of the total discharges of members in their first year of service in Fiscal Year 1997. (Italics added).

Id., at page 5.

"Conduct" is not the target of this Policy. The Policy is aimed at silencing homosexuals—and only homosexuals—in deference to the feared adverse reactions of others.

B. The Facts.

Petitioner Richard P. Watson remains on active duty as a commissioned officer, serving the Navy at United States Naval Station Bremerton. He serves by order of the Ninth Circuit who ordered that the district court's original injunction (dated August 10, 1995) be extended pending this petition for *certiorari.* Lieutenant Watson has a history of decorated service, acknowledged by both courts below, and continues to serve on active duty. *Holmes v. California Army National Guard,* 124 F.3d 1126 (9th Cir. 1997) (App., A, 1a-24a). Petitioner Andrew Holmes has already been discharged and no injunction affects his service; he too was decorated while on active duty. *Holmes v. California Army National Guard,* 124 F.3d 1126 (9th Cir. 1997) (App., A, 1a-24a).

In October 1994, Lt. Watson submitted a written statement to his commanding officer entitled Submission of Sexual Orientation Statement, in which he stated, among other things, "I have a homosexual orientation. I do not intend to rebut the presumption." *Watson Decl.* (App., L, 158a-159a) The presumption to which Lt. Watson referred is the Policy's presumption that a service member's mere acknowledgment of a homosexual orientation means that he intends to commit prohibited acts since "rebutting" the presumption requires completely *recanting* the statement of orientation. By stating that he would not "rebut" the presumption, Lt. Watson meant simply that he would "not retract or contradict the statement that I am gay." *Id.*

Based on the Sexual Orientation Statement, the Navy convened a Board of Inquiry on March 1, 1995. Based solely on Lt. Watson's two-sentence statement, the Board recommended that he be separated from the Navy. *Id.*

On June 3, 1993, First Lieutenant Holmes informed his commanding officer that "[a]s a matter of conscience, honesty and pride, I am compelled to inform you that I am gay." *Holmes v. California Army National Guard,* 124 F.3d 1126 (9th Cir. 1997).

C. Proceedings Below.

Lieutenant Watson filed this action in the district court on July 25, 1995, seeking declaratory and injunctive relief, challenging the Policy and his discharge on the grounds that the Policy, on its face and as applied, violates his constitutional rights to equal protection and due process under the Fifth Amendment and his right to freedom of speech

under the First Amendment. Lieutenant Watson also challenged the Naval regulations by which his severance pay would be halved upon discharge for homosexuality, as a violation of the Administrative Procedure Act, 5 U.S.C. § 706.

On August 10, 1995, the district court granted Lt. Watson's motion for a preliminary injunction against his pending discharge from the Navy. On January 19, 1996, cross-motions for summary judgment were argued, and on March 7, 1996, the district court entered its order denying Lt. Watson's motion for summary judgment and granting the government's motion for summary judgment, disposing of the first and fifth amendment claims. Order (3/7/96) (App., M, 160a-179a). On March 21, 1996, the court entered judgment for the government on those claims and dismissed without prejudice the APA claim. (App., N, 180a).

In March 1996, the district court in *Holmes* granted in part Holmes' partial motion for summary adjudication with respect to his federal equal protection and free speech claims, alleged against all defendants. (App., D, 46a-81a). Specifically, the district court concluded that the presumption in section 654(b)(2), which is triggered by a statement of homosexual orientation, unconstitutionally punishes Holmes for speech and for status as a homosexual, rather than for conduct. (App., D, 81a).

On May 15, 1996, Lieutenant Watson appealed, while the government appealed from the district court's finding in favor of Lieutenant Holmes. The cases were consolidated for oral argument. Arguments were heard in Seattle, Washington on July 8, 1996. The Ninth Circuit issued its opinion on September 5, 1997, (App., A, 1a-24a), and denied a petition for rehearing *en banc* on April 6, 1998, over the written dissent of five of its members. (App., B, 25a-27a).

Framing the Ninth Circuit's decision below was its unquestioning acceptance of the armed forces' proffered justifications for the Policy: preservation of unit cohesion, preservation of good order and discipline, prevention of privacy/sexual tension, and prevention of "acts." The Ninth Circuit did not consider any of these justifications under the holdings of *Palmore v. Sidoti*, 466 U.S. 429 (1984), *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), and most recently, *Romer v. Evans*, 517 U.S. 620 (1996), and, in fact, did not even discuss these cases, notwithstanding a staggering quantity of record evidence that the only motivation for the Policy was the armed forces' unyielding prejudice against homosexuals. The Ninth Circuit concluded instead that

Lieutenants Watson and Holmes were discharged for "homosexual conduct," thus accepting at face value the contrivance that "conduct" is what this Policy is intended to reach:

> Because our own circuit precedent plus the authority from every other circuit court that has addressed this issue establishes that the military has a legitimate interest in discharging service members on account of homosexual conduct in order to maintain effective armed forces, we must reject Watson's and Holmes' argument that there is no legitimate government interest in excluding homosexuals from military service on account of homosexual conduct.

Holmes v. California Army National Guard, 124 F.3d 1126, 1134.

REASONS FOR GRANTING THE PETITION

This Court cannot countenance result-driven disregard of its precedents by lower courts who defer to the armed forces' lamentable track record in the treatment of those who are disliked by some in military society. This Court must reckon with two circuits' disregard of long-standing precedents, and those circuits' acceptance of something this Court has forbidden: statutes drawn in deference to prejudice.

Most worrisome is the manner in which the courts below have reached this result in consideration of the Policy. By their uncritical acceptance of the assertion that the Policy reaches only "conduct," the courts enlarged the concept of "deference to Congress." No longer was "deference" limited to respect for Congress's judgments on "military matters" as this reference is conventionally understood. Rather, in both *Holmes v. California Army National Guard* (9th Circuit) and in *Thomasson v. Perry* (4th Circuit), "deference" was effectively construed to provide the armed forces with a full exemption from constitutional scrutiny on "military matters."

The most acute danger wrought by these decisions is their patent disregard of *Romer v. Evans*, 517 U.S. 620. The failure is all the more egregious since *Romer* was the culmination of a long line of this Court's decisions forbidding antipathy as a basis for the government's classifications of human beings. Ignoring *Romer* and the critical cases preceding it, the Ninth and Fourth Circuits have now divided our constitutional democracy into two distinct and unrelated segments: the non-uniformed civilian society to which *Romer, Palmore* and *Cleburne*

apply, and the uniformed society to which these cases have no application whatsoever.

I. This Case Presents Questions of Exceptional Importance, and the Decision of the Court of Appeals is Erroneous.

A. The Decision Below Ignores Compelling Precedents Of This Court, And Should Not Be Allowed To Stand—Even If This Court Employs The Least Scrutinizing Level Of Constitutional Review—Since It Creates An Unprecedented Broad "Deference To Congress" Exemption From This Court's Command That Prejudice Can Play No Part In Statutory Classifications Of Human Beings.

In determining whether an equal protection violation exists, there are two steps. First, the reviewing court must determine whether the classification is related to some permissible government purpose. The classification must have justification beyond catering to mere prejudice; a classification based on prejudice cannot withstand rational basis scrutiny. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

A classification rooted in prejudice is presumptively irrational. If the record shows that a classification was adopted to serve an impermissible purpose, or if the government identifies such a purpose in defending the classification, the purpose fails the first prong of the rational basis test; the reviewing court must then be more skeptical in its analysis of any other goals the government proffers. *Cleburne*, 473 U.S. at 450; *see also Vance v. Bradley*, 440 U.S. 93, 97 (1979) ("[a] statute is presumed constitutional only when there is no reason to "infer antipathy"). This skepticism leads courts (1) to refrain from making up new possible purposes for the classification which the state has not advanced, *Cleburne*, 473 U.S. at 448; (2) to reject neutrally-worded rationales that turn out to be disguised descriptions of government capitulations to prejudice, stereotype or other improper interests, *id.* at 449; and (3) to strictly insist that proffered rationales be more than hypothetical. *Cleburne*, 473 U.S. at 448.

Second, if a permissible government purpose has been found, the reviewing court must next determine whether the classification in dispute is rationally related to that purpose. In the case below, the court implicitly rejected this Court's formulation of rational basis review, did not evaluate the Policy's roots in prejudice, and uncritically accepted all of the armed forces' justifications at face value.

The court below explicitly offered "deference to Congress" to explain its scant scrutiny of the Policy, citing Supreme Court precedent for a proposition far broader than that actually articulated in the case. *Holmes v. California Army National Guard*, 124 F.3d at 1133 (9th Cir. 1996) ("our review is especially deferential in the military context"), citing *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986).

This was a clearly erroneous and unwarranted expansion of the concept of "deference." As in *Romer*, the Policy operates as an absolute exclusionary rule, inequitable in its application and onerous in its burdens on human beings who, under the Policy, are classified according to a revealed trait that some in the armed forces dislike. The courts, such as the Ninth Circuit, may indeed be incompetent to rule on genuinely military matters, defined as those related to the tactics and strategy involved in fighting and preparing for war. *See, e.g., Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). But this case and the Policy are not about uniforms, weapons, tanks, bullets, troop movements, planes or aircraft carriers. It is about the classification of human beings based on a disliked trait *unrelated to* their fitness to serve. Classifications of this kind are not uniquely military and the creation of them is not a skill in which the military excels, shown by history's condemnations of all of the military's past judgments in this area. *See, e.g., Buttino v. Federal Bureau of Investigation*, 801 F.Supp. 298, 302 (N.D.Cal. 1992) (history has taught that judicial deference to unsubstantiated assertions of "national security" may lead to "sweeping deprivations of equal protection which, with hindsight, are nearly universally condemned"). Contrary to the Ninth Circuit's implicit endorsement of military expertise in the classification of humans, it is difficult to imagine an area in which the military has *less* competence, especially in light of its record of animus against the subjects of the very classification at issue in this case, as well as a track record of exclusions now all universally condemned as odious. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944); *see also Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Committee on Armed Services*, 103d Cong., 2nd Sess. (1993), at 337 (Secretary of the Navy's 1941 defense of the Navy's black-exclusion policy as warranted by considerations of unit cohesion and good order and discipline), *infra* (App., J, 124a-125a).

Having expanded the concept of "deference," the Ninth Circuit rejected the equal protection objection that homosexuals cannot constitutionally be singled out so particularly for disparate treatment based on their revealed orientations, and implicitly approved the practical

result that identical platonic acts can have profoundly different consequences, depending on the orientation (or perceived orientation) of the actor. It ignored that if the armed forces' actual interest was in the prevention of "acts," the Uniform Code of Military Justice (UCMJ) can be even-handedly brought to bear against perpetrators without regard to orientation. *Philips v. Perry,* 106 F.3d 1420 (9th Cir. 1997) (Fletcher, J., dissenting). It ignored that while a heterosexual may declare his or her orientation, a homosexual is barred from doing so and instead is virtually forced to *lie* about his or her orientation. It ignored that a heterosexual may even declare an explicit intention to engage in any of the *many* sexual acts prohibited by the UCMJ, and escape any punishment whatsoever, while a homosexual is *presumed* to be prone to misbehavior merely by utterance of words declarative of an orientation that is *permitted.* It ignored that the heterosexual escapes any regulation of words which may explicitly announce future misconduct, while the homosexual's mere statement of orientation is enough to warrant action against the mere possibility of it. It also identified disparate treatment of homosexuals as a long-standing characteristic of military law, citing for this proposition an incorrect reference in the Policy to the Uniform Code of Military Justice and the Manual for Courts Martial, both of which are silent on the topic of homosexuality. *Holmes v. California Army National Guard,* 124 F.3d 1126 (9th Cir. 1997), citing section 654(a)(13) of the Policy.

B. It Is A Long-Standing Feature Of Supreme Court Jurisprudence That Prejudice Is A Forbidden Basis For The Formulation Of Government Policy; There Is No "Military Exception."

While relying on the Policy's incorrect summation of military law, and having so radically expanded the concept of "deference," the court below did not cite any of this Court's decisions that forbid statutory classifications drawn in deference to prejudice; nor did it explain the omission. The Fourth Circuit in *Thomasson v. Perry,* 80 F.3d 915 (4th Cir. 1996), relied on by the majority below, took a far harsher and much more detailed stand against judicial intervention, construing "deference" to mean that the judiciary has *no* role in evaluating the constitutionality of *any* act of Congress pertaining to the armed forces. *Thomasson* misapplied *City of Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432 (1985), stating that it applied only to suspect classifications (an extraordinary misapprehension), and cited *Korematsu v. United States,* 323 U.S. 214 (1944) for an affirmative proposition, even though this

discredited case is not commonly cited for any purpose other than to emphasize its odiousness.

The *Holmes* court failed to discuss or even recognize the Policy's roots in prejudice. Nor did it discuss the absence of evidence in support of the Policy's classifications or the overwhelming record evidence showing the Policy's irrationality. Instead, it credited the armed forces' proffered justifications simply because they were offered, questioned none of them, did not look behind them, and did not evaluate their links to animus. The court's holding is thus in defiance of this Court's inalterably clear command that

> [t]he Constitution cannot control . . . prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

Palmore v. Sidoti, 466 U.S. 429, 433. There is no "military exception" from this fundamental of American constitutional law. The circuits' discussions in support of their holdings mark a complete abandonment of this Court's command that inquiry be made to determine whether prejudice played a role in the formulation of statutory classifications of human beings. In *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1978), this Court recognized the

> distinction between "invidious discrimination"—i.e. classifications drawn "with an unequal eye and an uneven hand,"—and those special rules that are often necessary for general benefits [such as] supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects.

440 U.S. at 593 (internal citations omitted).

The court below fully adopted the government's position that this Policy's sole aim was to target "conduct." This, presumably, eliminated the need for inquiry into whether "prejudice" was the actual aim, notwithstanding a staggering quantity of evidence that this is so: a unit will not be cohesive (because some may dislike homosexuals); good order and discipline may be affected (because some may dislike obeying a homosexual senior); privacy may be implicated (because some may not like being "peeked at" by voyeuristic homosexuals); "acts" are prevented (since those with a homosexual orientation are so disposed to engage in them that the Policy presumes that they will).

Apart from being unsupported by any legitimate record evidence, these justifications self-evidently cater to those in military society *who may not like homosexuals*. There can be no doubt that were it not for long-standing, widespread prejudice against homosexuals, the Policy would not exist. This common sense conclusion is reinforced, not refuted, by the government's proffered justifications for the Policy, which demonstrate that it was created to accommodate the presumed prejudices of heterosexual service members.

C. The Court Below Steadfastly Ignored Romer v. Evans, 517 U.S. 620 (1996).

In failing to acknowledge and consider the roots of the Policy in anti-homosexual animus, the majority opinion below utterly ignored this Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996). Although *Romer* expressly holds that governmental regulation that is based on prejudice against homosexuals cannot survive constitutional scrutiny, the Ninth Circuit failed to discuss *Romer*'s impact on this case, except to cite it for the negative proposition that homosexuality is not a suspect classification. *Holmes v. California Army National Guard, 124 F.3d 1126, citing Romer v. Evans,* 517 U.S. 620.

Romer cannot be reconciled with the results reached below and in the Fourth Circuit. According to *Romer*, class-wide exclusions based on animus are nearly unprecedented in our jurisprudence, and are repugnant to a system premised on equality before the law. *Romer v. Evans,* 517 U.S. 620 (1996). Applied to the armed forces, this means that the Congress cannot selectively deny constitutional rights to service members based upon a revealed trait disliked by some in the military.

In *Romer,* the Court considered an amendment to the Colorado constitution, passed by popular referendum and referred to colloquially as "Amendment 2." In invalidating the amendment, the Court found that it explicitly placed homosexual men and women in a "solitary class" and withdrew from that class—and only that class—the protection of the laws. *Romer v. Evans,* 517 U.S. 620, 635-636. The Court ruled that such a classification failed even the most deferential rational basis scrutiny. *Romer v. Evans,* 517 U.S. 620, 631.

The Court's ruling applies directly to the Policy in this case: Amendment 2, according to the Court, was unconstitutional because it identified persons by a single trait—homosexual orientation—and then

imposed upon them a sweeping exclusion. *Romer v. Evans*, 517 U.S. 620, 634-635. The Court found that laws "singling out a certain class of citizens for disfavored legal status or general hardships are rare," *Romer v. Evans*, 517 U.S. at 634-635, and raise the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer v. Evans*, 517 U.S. 620, 634.

As with Amendment 2, the Don't Ask, Don't Tell Policy also "has the peculiar property of imposing a broad and undifferentiated disability on a single named group. . . ." *Romer v. Evans*, 517 U.S. 620, 632. The single named group isolated by the Policy is *homosexual* men and women. The broad and undifferentiated disability is that only *homosexual* men and women cannot speak of their orientations without penalty; only *homosexual* men and women cannot act in any way that communicates a *homosexual* orientation (notwithstanding that the Policy states as a premise that the status is not prohibited); only *homosexual* men's and women's statements of orientation are presumed to be admissions of *homosexual* conduct (even criminal conduct); and only those unable to convincingly repudiate *homosexual* status are discharged. The Policy isolates and then takes aim at a class based on a single characteristic that is disliked: *homosexuality*.

As in *Romer*, the Policy's "sheer breadth is so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests." *Romer v. Evans*, 517 U.S. 620, 632. The reasons offered for the Policy are familiar: unit cohesion, good order and discipline, privacy/sexual tension, and prevention of "acts." One of these—prevention of "acts"—is, to quote *Romer*, "implausible," *Romer v. Evans*, 517 U.S. 620, 637: these cases involved no "acts," and the armed forces' own study states that "acts" cases are a trivial percentage of the total number of homosexual discharges, which are almost exclusively "statement" cases.

The other justifications (unit cohesion, good order) cater solely to prejudice, or, again in the words of *Romer*, to "personal or religious objections to homosexuals." *Romer v. Evans*, 517 U.S. 620, 634; compare *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Committee on Armed Services*, 103d Cong., 2nd Sess. (1993), at 541 (informal survey found dislike of homosexuals); *id.* at 543 ("my men are Christian"), and *id.* at 557 (homosexuals breach "trust"). (App., J, 126a-130a). Furthermore, the language of prejudice is universal. Consider this defense of a previous military exclusion:

> The close and intimate conditions of life aboard ship, the necessity for the highest possible degree of unity and espirit de corps, the requirement of morale, all these demand that nothing be done which may adversely affect the situation. Past experience has shown irrefutably that the enlistment of Negroes other than for mess attendance leads to disruptive and undermining conditions.

Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Committee on Armed Services, 103d Cong., 2nd Sess. (1993), at 337. So said the Secretary of the United States Navy in 1941. *Id.*

The imposition on homosexuals invalidated by *Romer* was not so far-reaching as the imposition at-issue below. Amendment 2 did not operate and could not be brought to bear against a *particular* individual; Amendment 2 was class-wide and theoretical. This contrasts to the Policy. The full apparatus of the Policy is *designed* to be brought to bear against particular individuals, the instant they speak to identify themselves as members of the disfavored class. Its personal consequences are far more immediate and far more severe than Amendment 2. Amendment 2's invalidation commands the invalidation of this Policy.

D. The Court Wrongly Collapsed The Concepts Of Status And Conduct; In Approving Of The Policy's Forced Transformation Of "Status" Into "Conduct," The Court Below Ignored A Line Of This Court's Precedents Forbidding Exactly This.

By accepting at face value the definitional "presumptions" built into the Policy, the majority below approved the Policy's conversion of the Lieutenants' statements of orientation and status into admissions of "homosexual conduct." By blurring or ignoring the clear distinction between status and conduct, the Circuit ignored its own precedent, in *Meinhold v. United States Department of Defense,* 34 F.3d 1469 (9th Cir. 1994), in which it had construed the military's prior policy as constitutional only if it did not require discharge based solely on a statement of homosexual orientation. *Meinhold v. United States Department of Defense,* 34 F.3d at 1477-1478. The court below also ignored this Court's substantial line of cases holding that conduct or misconduct *may not be* presumed from status. In *Robinson v. California,* 370 U.S. 660 (1962), the Court struck down a statute criminalizing the "status" of drug addiction; in *Powell v. Texas,* 392 U.S. 514 (1968), the Court disapproved of arrests based on chronic alcoholism. Even more to the point, in *Jacobson v. United States,* 503 U.S. 540 (1992), the Court

held that even conduct itself does not demonstrate a propensity to engage in the same conduct again.

Notwithstanding this Court's history of explicit condemnations of presumptions of conduct from status, the court below phrased the issue with which it was faced in precisely those terms:

> The legal issue posed by these consolidated appeals is whether the military may discharge a service member based on an inference of homosexual conduct from his admission of homosexual orientation, without corroborating evidence of conduct or intent.

Holmes v. California Army National Guard, 124 F.3d 1126, 1131-1132. The court below resolved this issue by concluding that the armed forces may do exactly what this Court has permitted no other agency of federal, state, or local government to do, presume "conduct" from status:

> In sum, we find that the presumption is rationally related to the government's interest of excluding persons from military service based on homosexual conduct. Accordingly, Watson's and Holmes' discharges were based on an inference of homosexual conduct and not on their homosexual orientation.

Holmes v. California Army National Guard, 124 F.3d 1126, 1134.

E. Turning To The Petitioners' First Amendment Challenge, The Court Was Similarly Dismissive, Holding That The Policy Reached Only "Conduct," Not "Speech."

"Because Watson and Holmes were discharged for their conduct and not for speech, the First Amendment is not implicated." *See Holmes v. California Army National Guard,* 124 F.3d 1126, 1136, citing *Thomasson,* 80 F.3d at 931-934. This particular finding required that the court below ignore the *way* the Policy achieved this—by transforming "status" into "conduct." The court below did not address the point that no conduct need ever occur. Nor did it address the fact that the "conduct" ingredient was purely a creature of the statute, not of the service member, who need only speak to be discharged. The court did not address the plain irony of forbidding "speech" about a supposedly *permitted* status. The dissent, however, did:

> There can be no doubt that the [Policy] severely burdens speech. It unquestionably has the effect of chilling speech by homosexual service members—speech that is of tremendous importance to the individuals involved, speech that goes to their right to

> communicate the core of their emotions and identity to others. Given the regulation's provisions that permit homosexuals to serve in the armed forces, and that punish only homosexual conduct, there is no reasonable basis for prohibiting a service member from engaging in speech that serves only to declare his or her homosexual status.

Holmes v. California Army National Guard, 124 F.3d 1126, 1136 (1996) (Reinhardt, J., dissenting).

The opinion below did not discuss the arguments that the Policy restricts speech based on its content and viewpoint, and that this imposes the most suspect type of burden on speech, contrary to *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992). *See also Rosenberger v. Rector and Visitors of the University of Virginia,* 518 U.S. 819 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys"); *Simon & Shuster v. New York Crime Victims Bd.,* 502 U.S. 105, 116 (1991) ("The First Amendment presumptively places [content-based] discrimination beyond the power of the Government"). The court disregarded this Court's holding that the ability to communicate one's identity as a homosexual is protected speech. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557 (1995). The court's dissent from denial of *en banc* review recognized the Policy's acute restrictions of basic First Amendment freedoms. *Holmes v. California Army National Guard,* 124 F.3d 1126 (9th Cir. 1998). (Pregerson, J., joined by Kascinski, J., and Reinhardt, J.).

As with equal protection review, "deference" is no justification for the sweeping result reached below. Although judicial review of First Amendment challenges in the military is, indeed, deferential, "the military's need for discipline and order, which underlies such deference, does 'not, of course, render entirely nugatory in the military context the guarantees of the First Amendment.'" *See, e.g., Goldman v. Weinberger,* 475 U.S. 503, 507 (1986). In the military context, the Court has required at least that restrictions on speech burden it "no more than is reasonably necessary to protect a substantial government interest." *Brown v. Glines,* 444 U.S. 346, 356 (1980); *see also Greer v. Spock,* 424 U.S. 828 (1976). None of the First Amendment cases decided by this Court in the military setting addressed the kind of presumptively invalid, content and viewpoint-based restrictions involved here.

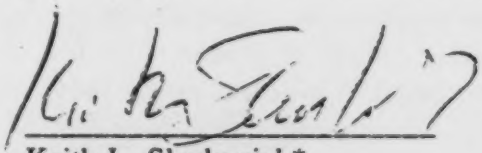
While failing to consider this line of First Amendment cases, the court below gave full voice to the justifications offered by the armed forces. Yet the only rationales offered in support of the Policy are those stating that homosexuals affect morale, discipline and unit cohesion because *other* service members will take offense at having acknowledged homosexuals in their midst. Such a rationale can *never* be a legitimate basis for a restriction of protected speech:

> If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

Texas v. Johnson, 491 U.S. 397, 414 (1989). *See also R.A.V. v. City of St. Paul*, 505 U.S. at 382; *Tinker v. Des Moines Indep. Community School District*, 393 U.S. 503, 509 (1969). Congress did what it cannot do: enact a statute whose rationale is based on the reactions of others.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.



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APPENDIX A

(Cite as: 124 F.3d 1126)

Andrew HOLMES, First Lieutenant, Plaintiff-Appellee,
v.
CALIFORNIA ARMY NATIONAL GUARD; Tandy Bozeman, Major, in his official capacity;
Pete Wilson, Governor, in his official capacity, Defendants-Appellants.
Andrew HOLMES, First Lieutenant, Plaintiff-Appellee,
v.
CALIFORNIA ARMY NATIONAL GUARD; Tandy Bozeman, Major, in his official capacity;
Pete Wilson, Governor, in his official capacity; U.S. Army National Guard; United States of America; William S. Cohen, Secretary of Defense, Defendants-Appellants.
Richard P. WATSON, Lieutenant, Plaintiff-Appellant,
v.
William S. COHEN, Secretary of Defense; John Dalton, Secretary of the Navy;
United States of America, Defendants-Appellees.

Nos. 96-15855, 96-15726 and 96-35314.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 8, 1996.

Submission vacated Aug. 16, 1996.
Resubmitted April 7, 1997.
Decided Sept. 5, 1997.

Christopher J. Bakes, Douglas G. Chapman III, Bakes & Chapman, San Francisco, CA, for appellant Watson. Kim M. Settles, Deputy Attorney General, Oakland, CA, for State appellants in Holmes. E. Roy Hawkens, Attorney, United States Department of Justice, Washington, DC, for Federal appellants in Holmes and the appellees in Watson.

Todd E. Thompson and L. Jay Kuo, Howard, Rice, Nemerovski, Canady, Falk & Rabkin, San Francisco, CA, for appellee Holmes. Melissa Wells-Petry, Washington, DC, for amicus curiae Family Research Council.Karen M. McGaffey, Bogle & Gates P.L.L.C., Seattle, WA, for amicus curiae Northwest Women's Law Center and Kirk Childress, Servicemembers Legal Defense Network, Washington, DC, for amicus curiae Servicemembers Legal Defense Network.

Appeals from the United States District Court for the Northern District of California; Saundra B. Armstrong, District Judge, Presiding. D.C. No. CV-95- 00688-SBA.

Appeal from the United States District Court for the Western District of Washington; Thomas S. Zilly, District Judge, Presiding. D.C. No. CV-95-01141- TSZ.

Before: REAVLEY, [FN*] REINHARDT, and WIGGINS, Circuit Judges.

FN* Hon. Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Opinion by Judge WIGGINS; Dissent by Judge REINHARDT. WIGGINS, Circuit Judge:

We review the constitutional challenges of two service members to the military's current "don't ask/don't tell" policy on homosexuals. [FN1] Pursuant to the policy, Lieutenant Richard P. Watson was discharged from the United States Navy and First Lieutenant Charles Andrew Holmes was discharged from the California Army National Guard ("CANG") and the United States Army National Guard ("USANG"). With respect to Watson, the district court granted summary judgment in favor of the Navy, holding that his discharge was essentially based on homosexual conduct and, therefore, the "don't ask/don't tell" policy was constitutional as it applied to him. Watson v. Perry, 918 F.Supp. 1403 (W.D.Wash.1996). With respect to Holmes, the district court granted summary judgment in Holmes's favor as to his claims for violation of his constitutional rights to equal protection and free speech, holding that his discharge was unconstitutional because it was based solely on his statement that he is homosexual. Holmes v. California Army Nat'l Guard, 920 F.Supp. 1510 (N.D.Cal.1996).

FN1. The "don't ask/don't tell" policy refers to 10 U.S.C. § 654 (Supp.1994) (codifying principal elements of the President's "Policy on Homosexual Conduct in the Armed Forces," announced July 19, 1993) and the Department of Defense's ("DOD") implementing regulations, effective February 28, 1994. See, e.g., DOD Directive 1332.30 (Separation of Regular Commissioned Officers) (Mar. 4, 1994). Because the regulations simply implement the policy of the statute in nearly identical terms, we refer interchangeably to § 654, the regulations, and the policy.

Watson and the defendants in Holmes appeal the respective district court orders, addressing the constitutionality of 10 U.S.C. § 654(b)(2) and its implementing regulations. [FN2] We have jurisdiction under 28 U.S.C. § 1291. On our own motion, we consolidated the appeals. Because we conclude that § 654(b)(2) and its implementing regulations are constitutionally valid, we affirm the district court in Watson and reverse in Holmes.

FN2. The Servicemembers Legal Defense Network and the Northwest Women's Law Center filed a joint amicus brief in support of Watson and Holmes. The Family Research Council filed an amicus brief in support of the appellees in Watson, and a separate amicus brief in support of the federal appellants (the USANG, United States, and Department of Defense Secretary William J. Perry) in Holmes.

BACKGROUND

The "Don't Ask/Don't Tell" Policy

The present policy regarding homosexuals in the military, commonly known as the "don't ask/don't tell" policy, is the product of extensive deliberation by Congress and the President. When it enacted the policy, Congress made a series of legislative findings, including the following: (1) that military life is fundamentally different from civilian life in that military society is characterized by numerous restrictions on personal behavior that would not be acceptable in civilian society, 10 U.S.C. § 654(a)(8)(B); (2) that standards of conduct for members of the armed forces must apply at all times to members whether on or off base and whether on or off duty, id. § 654(a)(10); (3) that the potential duties of the armed forces make it necessary for members of the armed forces to accept involuntarily living conditions characterized by forced intimacy with little or no privacy, id. §654(a)(12); (4) that "[t]he prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service," id. § 654(a)(13); and (5) that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in

homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability," id. § 654(a)(15).

The "don't ask/don't tell" policy differs from the military's former policy on homosexuals in that the statement, "homosexuality is incompatible with military service," was eliminated. See DOD Directive 1332.14, 32 C.F.R. pt. 41, App. A at 93 (1981) ("old policy"). As a result, the military no longer asks new recruits questions about their sexual orientation. Also unlike the old regulatory policy, the regulations implementing the new policy stipulate that sexual orientation is considered a personal and private matter, and does not bar entry into service or continued service, unless manifested by homosexual conduct. DOD Directive 1332.30 at 2-1(C). However, the "don't ask/don't tell" policy continues to require discharge of any service member (1) who engages in or intends to engage in homosexual acts, see 10 U.S.C. § 654(b)(1); DOD Directive 1332.30 at 2-2(C)(1)(a) (hereinafter "acts prong"); (2) who makes a statement that he is homosexual and fails to rebut the presumption, raised by that statement, that he has a propensity to engage in homosexual acts, see 10 U.S.C. § 654(b)(2); DOD Directive 1332.30 at 2- 2(C)(1)(b) (hereinafter "statement prong"); or (3) who has married or attempted to marry a person of the same biological sex, see 10 U.S.C. § 654(b)(3); DOD Directive 1332.20 at 2-2(C)(1)(c). [FN3] "Homosexual" is defined as "a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms 'gay' and 'lesbian.' " Id. § 654(f)(1). "Homosexual act" means:

FN3. Section 654(b) provides in full:

(b) Policy. A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

> (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that--
>
> > (A) such conduct is a departure from the member's usual and customary behavior;
> >
> > (B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

10 U.S.C. § 654(b) (emphasis added).

(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A). Id. § 654(f)(3).

The DOD Directive under which Watson and Holmes were discharged provides, among other things:

> Homosexual conduct is grounds for separation from the Military Services under the terms set forth in paragraph C.1.b, below. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service under this section unless manifested by homosexual conduct in the manner described in section C.1. DOD Directive 1332.30 at 2-1(C)

(emphasis added). The Directive provides that the statement, "I am gay," is sufficient to trigger the presumption. Id. at 8-1(B)(4)(b). [FN4] Paragraph (C)(1)(b) spells out the findings required to rebut the presumption under the acts and statement prongs of § 654(b) in virtually identical terms to § 654(b)(1), (2), (3). Id. at 2-2(C)(1)(a)-(b). [FN5]

FN4. The Guidelines for Fact-Finding Inquiries Into Homosexual Conduct section of the DOD Directive provides:

A "statement that a member is a homosexual or bisexual, or words to that effect," means (1) language or behavior that (2) a reasonable person would believe (3) was intended to convey the statement (4) that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts. This may include statements such as "I am homosexual," "I am gay," "I am a lesbian," "I have a homosexual orientation," and the like.

DOD Directive 1332.30 at 8-1(B)(4)(b).

FN5. As stated above, to rebut the presumption of homosexual conduct, a service member must demonstrate that he is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. 10 U.S.C. § 654(b)(2); DOD Directive 1332.30 at 2-2(C)(1)(b). Unlike the statute, the Directive defines "propensity to engage in homosexual acts":

Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. In determining whether an officer has successfully rebutted the presumption that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered:

(a) Whether the member has engaged in homosexual acts;

(b) The officer's credibility;

(c) Testimony from others about the officer's past conduct, character, and credibility;

(d) The nature and circumstances of the officer's statement;

(e) Any other evidence relevant to whether the officer is likely to engage in homosexual acts.

(This list is not exhaustive; any other relevant evidence may also be considered.)

Id.

Facts and Prior Proceedings

Watson.

Watson enlisted in the United States Navy in 1981 and was promoted to the rank of lieutenant in 1991. His fourteen-year Naval career is marked with many awards and honors. Before initiation of his discharge proceedings, Watson served as an Assistant Professor of Naval Science in the Naval Reserve Officers Training Corps. On October 28, 1994, Watson delivered to his commanding officer a one-page document, entitled "Submission of Sexual Orientation Statement," in which he stated: "I have a homosexual orientation. I do not intend to rebut the presumption." The presumption referred to by Watson is the rebuttable presumption in 10 U.S.C. § 654(b)(2), which provides that a service member may rebut his statement of homosexuality by demonstrating that he is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. Watson stated that he submitted his statement of sexual orientation because of his commitment to honesty and desire to eliminate any potential for blackmail attempts in the future.

Based on Watson's letter, the Navy issued a show cause order, requiring Watson to show cause before a three-member Board of Inquiry why he should be retained in the Navy. The Board of Inquiry convened on March 1, 1995. Although the Board instructed Watson, who was represented by counsel, that he needed to rebut the presumption that he engages in or intends to engage in homosexual acts to avoid discharge, Watson presented no such evidence; instead, he presented evidence of his excellent service record. As a result, the Board unanimously recommended that Watson be honorably discharged "by reason of homosexual conduct." On March 28, 1995, Watson's civilian counsel submitted a Letter of Deficiency to the Commander of Naval Base Seattle and the Board of Review for their consideration in reviewing the Board of Inquiry's decision. The following statement by Watson was included with the letter:

> a. I expressly deny that I have engaged in any homosexual conduct with any military student or service member.
>
> b. I expressly deny that I engaged in any homosexual conduct during the performance of military duty, or while on any military installation.
>
> c. I expressly deny that I have any intent or propensity to engage in any conduct described above.

The Commander concurred with the Board of Inquiry's findings, concluding that Watson's statement failed to address whether Watson had any intent or propensity to engage in off-base, off-duty homosexual conduct with nonmilitary personnel and that the statement therefore failed to rebut the presumption of homosexual conduct. He recommended to the Chief of Naval Personnel that Watson be discharged. Both the Board of Inquiry and the Commander rejected Watson's argument that, because he was not represented by counsel when he submitted his original statement about his intention not to rebut the presumption, that statement should be construed to mean only that he did not want an embarrassing inquiry into his private life. The Board of Review voted unanimously to recommend Watson's separation from service with an honorable discharge. In June 1995, the Navy notified Watson that he would be discharged from the Navy in July 1995.

On July 25, 1995, Watson commenced this action for injunctive and declaratory relief against Secretary of Defense William J. Perry, [FN6] Secretary of the Navy John E. Dalton, and the United States. The complaint alleged that the basis for his impending discharge, the "don't ask/don't tell" policy, on its face or as applied, violates Watson's right to equal protection and substantive due process under the Fifth Amendment and to free speech under the First Amendment. It also alleged that the Navy's refusal to provide Watson full severance pay violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. The district court preliminarily enjoined the Navy from discharging Watson or taking any adverse action against him pending the outcome of the litigation. We have ordered that the preliminary injunction remain in effect pending this appeal.

FN6. Pursuant to Fed. R.App. P. 43(c), we have substituted present Secretary of Defense William S. Cohen for former Secretary of Defense William J. Perry.

In March 1996, the district court granted summary judgment in favor of the government on Watson's constitutional claims. The court rejected Watson's argument that his discharge was based on speech regarding his homosexual orientation rather than homosexual conduct. Instead, the district court held that the "don't ask/don't tell" policy, as applied to Watson, was constitutional because his discharge was based on a likelihood of homosexual conduct by Watson, as inferred by his statements. The district court concluded that Watson failed to rebut the presumption in § 654 by upholding the government's inference from Watson's statements that he manifested an intent or propensity to engage in off-base, off-duty homosexual conduct with nonmilitary personnel. Also based on the inference of Watson's conduct, the district court held that Watson's due process and First Amendment claims

lacked merit. The district court entered judgment in favor of the government and dismissed without prejudice Watson's APA claim.

Holmes.

Holmes enlisted in the CANG in 1986 and was sworn in as an officer in 1989. As a member of the CANG, Holmes participated in drills 48 times a year over weekends. Also in 1989, Holmes received a commission as an officer in the USANG. He earned many honors during his service, including promotion to First Lieutenant and Combat Military Police Platoon Leader. On June 3, 1993, represented by civilian counsel, Holmes voluntarily sent a memorandum to his commanding officer at the CANG, in which he stated, inter alia: "[A]s a matter of conscience, honesty and pride, I am compelled to inform you that I am gay." Based on this memorandum, the commanding officer initiated a request to withdraw Holmes's federal recognition as an officer in the USANG. [FN7]

FN7. Federal recognition is the acknowledgment that an officer of a state national guard unit may become an officer of the United States Army National Guard and meets the requirements for holding such position in the USANG. 32 U.S.C. § 307(d).

On May 21, 1994, a Federal Recognition Withdrawal Board commenced proceedings to determine if Holmes's federal recognition should be withdrawn. CANG and USANG representatives attended the hearing. Holmes was represented by civilian and military counsel. Applying the DOD's new regulations under the "don't ask/don't tell" policy, the Board found that Holmes's admission of his sexual orientation triggered the presumption of homosexual propensity under § 654(b)(2) and required him to rebut that presumption to retain his federal recognition. Like Watson, Holmes presented only evidence of his excellent service record at the hearing. As a result, the Board recommended to the Chief of the National Army Guard Bureau, a joint bureau of the Departments of the Army and Air Force, that Holmes's federal recognition be withdrawn. The Chief reviewed and approved the Board's findings on September 12, 1994. In October 1994, the USANG discharged Holmes. Thereafter, in January 1995, the CANG notified Holmes of his discharge from the part of CANG subject to being called into federal service, based solely on his loss of federal recognition. Holmes currently holds an officer position in the state and United States reserve groups that does not require federal recognition and is not subject to being called into federal service.

In February 1995, Holmes commenced this action for injunctive and declaratory relief and for damages against the USANG, United States, and

Secretary of Defense William J. Perry [FN8] (collectively "federal appellants"); and the CANG, Major General Tandy Bozeman, and California Governor Pete Wilson (collectively "state appellants"). His first amended complaint alleged thirteen claims based on California state law and the United States Constitution. In March 1996, the district court granted in part Holmes's cross-motion for summary adjudication with respect to his federal equal protection and free speech claims, alleged against all defendants. Specifically, the district court concluded that the presumption in § 654(b)(2), which is triggered by a statement of homosexual orientation, unconstitutionally punishes Holmes for speech and for status as a homosexual, rather than for conduct. The court also dismissed Holmes's remaining federal claims and dismissed without prejudice his state-law claims. The district court further ordered that Holmes be reinstated to the part of the CANG subject to being called into federal service and that his federal officer status in the USANG be restored. Holmes stipulated that he would not seek reinstatement pending this appeal.

FN8. See supra note 6.

DISCUSSION

I. STANDARD OF REVIEW

We review a grant of summary judgment de novo. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir.1995), cert. denied, 516 U.S. 1171, 116 S.Ct. 1261, 134 L.Ed.2d 209 (1996). "We must determine whether the evidence, viewed in a light most favorable to the non-moving party, presents any genuine issues of material fact and whether the district court correctly applied the law." Id.

II. ANALYSIS

The legal issue posed by these consolidated appeals is whether the military may discharge a service member based on an inference of homosexual conduct from his admission of homosexual orientation, without corroborating evidence of conduct or intent. The "don't ask/don't tell" policy expressly provides for the discharge of any service member who states that he is a homosexual unless he rebuts the presumption that he will likely engage in homosexual conduct. See 10 U.S.C. § 654(b)(2); DOD Directive 1332.30 at 2-2(C)(1)(b). Both Watson and Holmes challenged the constitutionality of the policy's presumption of homosexuality that is created solely by a statement of homosexual orientation, such as "I have a homosexual orientation" or "I am gay." The constitutionality of § 654(b)(2)-the statement prong of the military's

new policy-is an issue of first impression in this circuit. Only the Second, Fourth, and Eighth Circuits have addressed this question to date. See Richenberg v. Perry, 97 F.3d 256 (8th Cir.1996) (holding that § 654(b)(2) does not violate the Fifth Amendment's equal protection component or the First Amendment right to free speech); Able v. United States, 88 F.3d 1280 (2d Cir.1996) (stating that if § 654(b)(1) was valid, § 654(b)(2) would also be valid but not deciding constitutionality of § 654(b)(1)'s prohibition against homosexual conduct); Thomasson v. Perry, 80 F.3d 915 (4th Cir.) (en banc) (holding that § 654(b)(2) does not violate the Fifth Amendment's rights to equal protection and substantive due process or the First Amendment's right to free speech), cert. denied, --- U.S. ----, 117 S.Ct. 358, 136 L.Ed.2d 250 (1996). For the following reasons, we follow the reasoning of Richenberg, Able, and Thomasson, and we conclude that § 654(b)(2) and its implementing regulations are constitutional on their face and as applied to Watson and Holmes.

A. Equal Protection Challenge

We consider first whether the statute and implementing regulations, on their face and as applied, [FN9] violate the equal protection component of the Due Process Clause of the Fifth Amendment. We are guided in this inquiry by our recent decision in Philips v. Perry, 106 F.3d 1420 (9th Cir.1997), in which we upheld the acts prong of § 654(b)(1) against an equal protection challenge.

FN9. The district court in Watson held that application of the "don't ask/don't tell" policy was constitutional as applied to Watson and, therefore, did not reach Watson's facial challenge to the statute. In Holmes, it appears that the district court held that the statute's statement prong is facially invalid.

1. Rational Basis Review

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). We have held that "it is ... clear that there is an equal protection component of the Due Process Clause of the Fifth Amendment which applies to the federal government." High Tech Gays v. Defense Indus. Sec. Clearance Office, 895

F.2d 563, 570 (9th Cir.1990). Because homosexuals do not constitute a suspect or quasi-suspect class, we subject the military's "don't ask/don't tell"

policy to rational basis review. Philips, 106 F.3d at 1425 (citing High Tech Gays, 895 F.2d at 574); see also Romer v. Evans, 517 U.S. 620, ----, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855 (1996) (applying rational basis review and upholding an equal protection challenge to Colorado's Amendment 2, which prohibited any state or local legislative, executive or judicial action designed to protect homosexual persons). In order to show that the statute and accompanying regulations are invalid, Watson and Holmes must show that they are not rationally related to any legitimate governmental purpose. Heller v. Doe, 509 U.S. 312, 320, 113 S.Ct. 2637, 2642-43, 125 L.Ed.2d 257 (1993).

In a series of statements, the Heller Court made it clear that our inquiry is limited: "rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices,' " id. at 319, 113 S.Ct. at 2642 (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993)); "[a] statute is presumed constitutional ... and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record," id. at 320-21, 113 S.Ct. at 2643 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 93 S.Ct. 1001, 1006, 35 L.Ed.2d 351 (1973)); and, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends," id. at 321, 113 S.Ct. at 2643. Additionally, our review is especially deferential in the military context. Goldman v. Weinberger, 475 U.S. 503, 508, 106 S.Ct. 1310, 1313-14, 89 L.Ed.2d 478 (1986); see also Gilligan v. Morgan, 413 U.S. 1, 10, 93 S.Ct. 2440, 2445-46, 37 L.Ed.2d 407 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence."). As we recently recognized again in Philips, " '[r]egulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessities.' " 106 F.3d at 1425 (quoting Beller v. Middendorf, 632 F.2d 788, 811 (9th Cir.1980)). Accordingly, we must be careful to avoid substituting our judgment and our evaluation of the evidence to justify a policy. See Rostker v. Goldberg, 453 U.S. 57, 68, 101 S.Ct. 2646, 2653-54, 69 L.Ed.2d 478 (1981).

2. Legitimate State Interest

Under rational basis review, we must initially examine the government's asserted interest in excluding those who engage in homosexual conduct from military service. The government contends that excluding homosexuals who engage in or have the propensity to engage in homosexual acts from military service furthers discipline and combat readiness in the military by preventing

risks to unit cohesion posed by the presence of such homosexuals. See 10 U.S.C. § 654(a)(15). Although this interest is subject to criticism, see, e.g., Philips, 106 F.3d at 1434-38 (Fletcher, J., dissenting) (arguing that "unit cohesion" and other rationales are a pretext for the disapproval of homosexuality on the part of heterosexuals), the government's interest in maintaining effective armed forces has been repeatedly upheld by this circuit. Id. at 1425 ("[M]aintaining effective armed forces is indisputably a compelling governmental purpose."); Hatheway v. Secretary of the Army, 641 F.2d 1376, 1382 (9th Cir.1981) ("The government has a compelling interest in maintaining a strong military force. Underlying our holding in Beller was the judgment that those who engage in homosexual acts severely compromise the government's ability to maintain such a force. That judgment was the basis for our holding that the Navy's policy of discharging all such persons was constitutionally permissible."); Beller, 632 F.2d at 812 (Kennedy, J.) ("In view of the importance of the military's role, the special need for discipline and order in the service, the potential for difficulties arising out of possible close confinement aboard ships or bases for long periods of time, and the possible benefits to recruiting efforts, however, we conclude that at the present time the regulation represents a reasonable effort to accommodate the needs of the Government with the interests of the individual."). Other circuits have also concluded that the military has at least a legitimate interest in excluding service members who engage in homosexual conduct. See, e.g., Richenberg, 97 F.3d at 262 ("Military leaders have determined that excluding those with a propensity to engage in homosexual acts, like providing separate housing for men and women, reduces sexual tensions that would jeopardize unit cohesion, the cornerstone of an effective military."); Thomasson, 80 F.3d at 929; Walmer v. United States Dep't of Defense, 52 F.3d 851, 854-55 (10th Cir.) ("[W]e ruled in Rich that a compelling governmental interest supported the military policy requiring discharge of homosexuals."), cert. denied, --- U.S. ---, 116 S.Ct. 474, 133 L.Ed.2d 403 (1995); Woodward v. United States, 871 F.2d 1068, 1076-77 (Fed.Cir.1989); Dronenburg v. Zech, 741 F.2d 1388, 1398 (D.C.Cir.1984); Rich v. Secretary of Army, 735 F.2d 1220, 1228-29 (10th Cir.1984).

Because our own circuit precedent plus the authority from every other circuit court that has addressed this issue establishes that the military has a legitimate interest in discharging service members on account of homosexual conduct in order to maintain effective armed forces, we must reject Watson's and Holmes's argument that there is no legitimate government interest in excluding homosexuals from military service on account of homosexual conduct. As stated by the Fourth Circuit, "[a]ny argument that Congress was misguided in [concluding that homosexual conduct would affect military

effectiveness] is one of legislative policy, not constitutional law." Thomasson, 80 F.3d at 929.

3. Rational Relation

Watson and Holmes next contend that it is not rational for the government to presume from statements regarding homosexual orientation that they will likely engage in homosexual conduct. Watson and Holmes argue that the presumption of § 654(b)(2) and its implementing regulations lacks a rational relationship to a legitimate state interest because it allows for discharge based on homosexual status.

In Meinhold v. United States Dep't of Defense, 34 F.3d 1469 (9th Cir.1994), we considered an equal protection challenge to the military's old policy on homosexuals. Navy Petty Officer Meinhold was discharged after he made the statement "I am in fact gay." In assessing Meinhold's constitutional claims, we recognized the "serious question" raised by the military's apparent policy of presuming that persons of homosexual orientation would violate regulations: "Equating status or propensity with conduct or acts that are prohibited is problematic as well. The Supreme Court has long recognized the constitutional infirmity of penalizing status alone." Id. at 1478.

To avoid this constitutional difficulty, we interpreted the old policy regarding homosexuals in the military narrowly, relying on the fact that the military's policy did not appear to allow the discharge of a service member solely because of a homosexual orientation. Accordingly, the holding we reached was narrow:

> We therefore hold that the regulation under which Meinhold was processed need not be construed so broadly as to raise constitutional concerns. It can reasonably be construed to reach only statements that show a concrete, fixed, or expressed desire to commit homosexual acts despite their being prohibited. The Navy adopted its regulation to Meinhold's statement of orientation alone and based his separation solely on his classification as a homosexual. His statement-"I am in fact gay" in the circumstances under which he made it manifests no concrete, expressed desire to commit homosexual acts. The Navy's presumption that Meinhold desires or intends to engage in prohibited conduct on this basis of his statement alone therefore arbitrarily goes beyond what [the military's] policy seeks to prevent. Accordingly, Meinhold's discharge on that basis cannot stand. Id. at 1479-80. [FN10]

FN10. While we hesitated in Meinhold to hold that it would be proper to infer homosexual conduct from a statement of homosexual orientation, the D.C. Circuit subsequently adopted the view that such an inference was entirely rational. See Steffan v. Perry, 41 F.3d 677, 688-90 (D.C.Cir.1994) (en banc) ("It is sufficient to recognize that the government's presumption, as embodied in the Academy regulations, is certainly rational given that the human sexual drive is enormously powerful and that an open declaration that one is a homosexual is a rather reliable indication as to the direction of one's drive.").

Because we face a direct challenge to the statement prong of the military's new policy, we must now face the question we avoided in Meinhold: whether the military's presumption from a service member's statement of homosexuality that he or she will engage in homosexual conduct bears a rational relationship to the military's interest in maintaining effective armed forces. We are assisted in this regard by recent decisions from several other circuit courts.

In Thomasson, the Navy discharged Lieutenant Thomasson after he submitted a written statement indicating that he was gay and then failed to rebut the presumption by presenting any specific evidence about whether he engaged or intended to engage in homosexual acts. In holding that the presumption contained in § 654(b)(2) is rationally related to a legitimate state interest, the Fourth Circuit reasoned as follows:

> We think, however, that the means chosen by Congress in the Act are rationally related to legitimate legislative ends. The presumption that declared homosexuals have a propensity or intent to engage in homosexual acts certainly has a rational factual basis. In fact, the presumption ... represents perhaps the most sensible inference raised by a declaration of one's sexual orientation.... Although Thomasson argues that some declared homosexuals have not engaged in and do not have a propensity or intent to engage in homosexual acts, "courts are compelled ... to accept a legislature's generalizations even when there is an imperfect fit between means and ends."

Id. at 930 (quoting Heller, 509 U.S. at 312, 113 S.Ct. at 2639) (citation omitted).

Similarly, the Second and Eighth Circuits also recently decided that the rebuttable presumption created by the statements prong is rationally related to the military's interest in preventing homosexual conduct, respectively reasoning that "the statements presumption of subsection (b)(2) substantially furthers the government's [important] interest ... in preventing the occurrence of homosexual acts in the military," Able, 88 F.3d at 1296; and that "it is

rational to assume that both homosexuals and heterosexuals 'are likely to act in accordance with their sexual drives,' " Richenberg, 97 F.3d at 262 (quoting Steffan, 41 F.3d at 692).

We agree with the Second, Fourth, and Eighth Circuits on this issue. Although the legislature's assumption that declared homosexuals will engage in homosexual conduct is imperfect, it is sufficiently rational to survive scrutiny under Heller. Moreover, even if Meinhold in fact did require a discharge to be based on more than a mere statement, the discharges of Watson and Holmes meet this standard. Their discharge orders were based on their initial statements plus their failure to present any evidence at their discharge hearings to rebut the presumption that a declaration of homosexuality evidences a propensity to engage in prohibited homosexual conduct. Thus, under the statements prong of the "don't ask/don't tell" policy, service members are not discharged for having a homosexual "status." The discharges result because of actual conduct or a propensity for conduct that is prohibited. Watson's and Holmes's respective declarations of homosexual orientation did not automatically lead to their discharge; rather, their declaration was coupled with their tacit acceptance of the link between their orientation and their conduct, as evidenced by their failure to show that they did not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts. Although Watson presented a statement contending that he did not commit homosexual acts on base, on duty, or with other military personnel, neither Watson nor Holmes offered any evidence regarding off base, off duty activity, even though military regulations still reach the off base and off duty activities of military personnel. See 10 U.S.C. § 654(a)(10).

Watson argues that the rebuttable presumption procedure is meaningless because homosexual service members would be able to rebut the presumption only by denying their homosexual orientation. The district court record shows that the government presented evidence that service members had successfully rebutted the presumption in several cases. Although Watson persuasively argues that some of these cases involve extraordinary circumstances (e.g., one male service member stated at the hearing that he actually was confused about his sexuality but vowed abstinence, while another male service member was married to a woman at the time of the hearing), there were examples that were less unusual.

For instance, one female Naval officer admitted to her homosexuality but submitted a statement, in which she stated, inter alia, that she understands the rules against homosexual conduct and intended to obey those rules. Another female Naval officer stated that she was a lesbian but that the statement "in no

way, was meant to imply [ ] any propensity or intent or desire to engage in prohibited conduct." Unlike Watson and Holmes, these two officers clearly stated that they would not engage in any homosexual conduct. Although the record also describes another successful rebuttal where the male service member was retained by the Air Force even though he apparently only presented evidence of being well-liked, the fact that other service members have successfully rebutted the presumption without denying their homosexual orientation undermines Watson's argument.

Last, Watson's and Holmes's argument that the policy, as applied, treats homosexual and heterosexual persons differently is also without merit. To the extent that Watson's and Holmes's argument is based on the fact that there is no presumption of prohibited conduct by heterosexuals, this difference is explained by the fact that "[h]omosexuals and heterosexuals are ... differently situated in that heterosexuals have a permissible outlet for their particular sexual desires whereas homosexuals in the military do not." Steffan, 41 F.3d at 692. Furthermore, the policy itself does not distinguish between persons of homosexual and heterosexual orientation, providing that any person who makes a statement of homosexual orientation is subject to the same rebuttable presumption that arose against Watson and Holmes.

In sum, we find that the presumption is rationally related to the government's interest of excluding persons from military service based on homosexual conduct. Accordingly, Watson's and Holmes's discharges were based on an inference of homosexual conduct and not on their homosexual orientation.

B. Substantive Due Process Challenge

We have previously rejected claims similar to Watson's substantive due process claim. See Schowengerdt v. United States, 944 F.2d 483, 490 (9th Cir.1991) (stating that substantive due process claim with respect to the old policy was foreclosed by Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), Beller, and High Tech Gays).

C. First Amendment Challenge

Watson and Holmes contend that § 654(b)(2) and the accompanying directives violate the First Amendment because they target the expression of a gay identity without sufficient justification. They specifically complain that § 654(b)(2), which is triggered by a "state[ment] that one is a homosexual or bisexual, or words to that effect," reaches constitutionally-protected speech, and covers expressive behavior that is likewise protected by the First Amendment.

However, because Watson and Holmes were discharged for their conduct and not for speech, the First Amendment is not implicated. See Thomasson, 80 F.3d at 931-34 (holding that the statement prong of the "don't ask/don't tell" policy is not directed at speech and therefore does not violate the First Amendment); see also Pruitt v. Cheney, 963 F.2d 1160, 1164 (9th Cir.1991) (stating that Pruitt's discharge under the old policy following his admission of homosexual orientation was not based on speech). Although Pruitt involved the old policy, its reasoning--"Pruitt's admission, like most admissions, was made in speech, but that does not mean that the [F]irst [A]mendment precludes the use of the admission as evidence of the facts admitted"--applies equally to the application of the "don't ask/don't tell" policy. Pruitt, 963 F.2d at 1164 (citing High Tech Gays, 895 F.2d at 578-80).

D. State Appellants' Challenge

Because we find that the statement prong is constitutional, we need not reach the reach the issue of whether the state of California may be held liable for the alleged unconstitutional application of the "don't ask/don't tell" policy in Holmes.

E. Attorney's Fees, Costs, and Expenses

We deny Watson's and Holmes's requests for attorney's fees, costs, and expenses, pursuant to 28 U.S.C. § 2412, because they are not prevailing parties.

III. CONCLUSION

For the foregoing reasons, we AFFIRM in Watson, REVERSE in Holmes, and DENY Watson's and Holmes's requests for attorney's fees, costs, and expenses.

DISSENTING OPINION

REINHARDT, Circuit Judge, dissenting.

I respectfully dissent. I believe that discharging a serviceman on the basis of the statement "I am a homosexual," "I am gay," or "I am a lesbian" impermissibly burdens rights guaranteed by the First Amendment. [FN1] Accordingly, I would hold that 10 U.S.C. § 654(b)(2) and its implementing regulations are unconstitutional. [FN2]

FN1. Hereafter, I use the term "homosexual" for purposes of simplicity, although I recognize that "gay" and "lesbian" is the preferred terminology.

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FN2. I use the term "policy" or "Don't Ask, Don't Tell policy" throughout to refer individually and collectively to the applicable statute, of which § 654(b)(2) is a part, and the pertinent Department of Defense Regulations. See 10 U.S.C. § 654(a)-(f) (1994); Department of Defense Directive ("DoD Dir.") 1332.30.

I recognize that we are bound by this court's recent decision that the military may discharge service members who engage in homosexual conduct. See Philips v. Perry, 106 F.3d 1420 (9th Cir.1997). Although I must follow that decision here, I note that it is necessarily rooted in Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), a decision that I have previously described as similar in its bias and prejudice to Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). I remain confident that someday a Supreme Court with a sense of fairness and an adequate vision of the Constitution will repudiate Bowers in the same way that a wise and fair-minded Court once repudiated Plessy. Indeed, I hope that day will not be long in coming. [FN3] In my view of the Constitution, there is no more justification for discrimination against individuals because of their sexual orientation, which is most frequently a happenstance of birth, than there is

DISSENTING OPINION for discrimination against blacks, Hispanics or Asians--or against Catholics, Jews, or Muslims, who at least have the option to convert.

FN3. The Court has imposed some restrictions on discrimination against persons because of their sexual orientation, although thus far only under highly limited circumstances. See Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). It has never ruled on the issue of homosexuals in the military, or indeed on any other question involving homosexuals in government employment.

Nevertheless, the fact that conduct may be banned does not mean that speech may be also. Certainly, an admission of prohibited conduct, although speech, is an admission of an offense and may serve as the basis for discipline. However, admitting that one is homosexual is not admitting to an offense under the newly crafted and somewhat schizoid "Don't Ask, Don't Tell" policy. For, under that policy, homosexual status--being a homosexual--is not an offense. To the contrary, the military now purports to welcome into the service individuals who are homosexuals--but only so long as they don't engage in homosexual conduct. [FN4] This might appropriately be analogized to welcoming Jews to be a part of society so long as they do not attend synagogue or pray publicly or privately to G-d. Nevertheless, it is the

policy that the President and the Congress in their collective wisdom have agreed upon.

FN4. The change in policy is evidenced by a change in the language of the regulations. Although the military formerly insisted that "homosexuality is incompatible with military service," it currently takes the position that "sexual orientation is considered a personal and private matter." DoD Dir. 1332.30 at 2-1.

While I have previously explained why I believe the status/conduct distinction to be irrational and without substance, Watkins v. United States Army, 837 F.2d 1428 (9th Cir.1988) (Reinhardt J., dissenting), the "Don't Ask, Don't Tell" policy adopts the opposite view. [FN5] The proponents of the status/conduct distinction seem to believe that classifications such as homosexual and heterosexual are based on something other than sexual conduct, perhaps one's taste in art, music, literature, dress, or the pursuit of a particular, if indefinable, "life-style." This argument confuses cause and effect. What makes a person a homosexual, or a heterosexual, is the abiding desire to engage in sexual conduct with persons of the same sex, or persons of the opposite sex. It is no secret, even to federal judges, that the sexual drive is a strong one. Sex is the elementary form of human activity and expression, and it provides the basis for the most important of human relationships, rivaled only by that of parent and child. It also provides the basis for distinguishing homosexuals from heterosexuals.

FN5. Some courts have agreed with the distinction, including the majority opinion in Watkins v. United States Army, 837 F.2d 1428 (9th Cir.1988).

The complications regarding sexual preferences involve questions such as whether one is born with a particular orientation or acquires it, and whether one may constitutionally be forced to lead a sexless life in order to serve one's country as a member of the military. [FN6] Most persons are born with a particular sexual preference and in the vast majority of cases, it is heterosexual; a minority is born with homosexual preferences. In some cases, it may not be so clear what one's preferences are; in some cases there may be ambivalence; in some a preference for both sexes; and in some a complete lack of interest in sexual conduct. (The latter would appear to be the smallest group.) But the idea that persons should be compelled to surrender entirely the right to engage in sexual conduct if they wish to serve in the armed forces would seem to me clearly to conflict with the Constitution and in particular with substantive due process. Nevertheless, as I have acknowledged, that is not the current state of the law and I am bound to follow a view contrary to my own, pending a

repudiation of Bowers by the Court or its issuance of an opinion construing Bowers to mean something other than what its authors intended.

FN6. See, Philips, supra.

In any event, the consequence of the military's artificial status/conduct distinction is that homosexual status is acceptable and not a ground for discharge. As the government says in its brief, under the new policy "sexual orientation is considered a personal and private matter and is not by itself a basis for discharge." (quoting DoD Directive 1132.30 at 2-1.) Only conduct is prohibited, and we must take that distinction, however fallacious it may be, at face value. That the regulation may draw irrational lines or establish arbitrary and unrealistic distinctions is not the issue here. I must proceed on the assumption that the prohibition against homosexual conduct is constitutional under Perry, and that nevertheless the military welcomes with open arms those persons of homosexual status. Accordingly, the question in this case is simply whether an admission of homosexual status may serve as the basis for discharge when the fact of that status does not.

It is evident to me that if homosexual status is not a bar to service, admitting to that status--the statement that "I am a homosexual"--cannot itself be a cause for discharge. There can be nothing wrong about admitting to a status that is proper; yet what is being punished in the case before us is just that--the admission of a permissible status. Clearly, therefore, it is not the status that is being punished; it is the speech. Punishing speech that does no more than acknowledge a permissible status violates the First Amendment. There is no legitimate, let alone compelling, governmental interest in punishing a serviceman's acknowledgment that he is a member of a group that is eligible for military service. [FN7]

FN7. Pruitt v. Cheney, 963 F.2d 1160 (9th Cir.1991), is not to the contrary. Under the old policy at issue in Pruitt, servicemen were subject to discharge for being homosexual. "It was her homosexuality, and not her speech that caused Pruitt to be discharged.... Pruitt admitted homosexuality and was discharged for it." Id. at 1164. Under "Don't Ask, Don't Tell," homosexuality itself is not a cause for discharge.

I recognize that the majority's view is similar to that of the Second, Fourth, and Eighth Circuits. See Able v. United States, 88 F.3d 1280 (2d Cir.1996); Thomasson v. Perry, 80 F.3d 915 (4th Cir.1996); Richenberg v. Perry, 97 F.3d 256 (8th Cir.1996). While this must give me pause, I am still required to construe the Constitution as I understand it in light of binding Supreme Court precedent. While under the First Amendment speech may be limited in some circumstances, particularly in the military, see Greer v. Spock, 424 U.S. 828,

96 S.Ct. 1211, 47 L.Ed.2d 505 (1976), I find no legitimate interest that overrides the interest in free speech in this case. See Reno v. ACLU, --- U.S. ----, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). I will discuss the sole justification offered by the government in the text infra at 11367-68.

In the end, the drafters of the regulation are trapped by their own dissembling and by their desire to avoid facing a critical issue forthrightly. The "compromise" they have arrived at necessarily leads to disingenuous and arbitrary results. It will inevitably be enforced differently from base to base and will result in unfair and discriminatory treatment of many valued long-term members of the military service. Perhaps this is the nature of compromise, at least during the course of some administrations, especially where the military is involved. As the majority points out, the military is freer to infringe on individual rights than are other parts of government.

Even that legal doctrine cannot, however, save a policy that is founded on an erroneous and wholly unsupportable presumption. Moreover, it is difficult to see how the military can benefit from a policy fraught with such patent disingenuousness. "Don't Ask, Don't Tell" seems entirely inconsistent with the proud traditions of our armed services, with the slogans such as Duty, Honor, Country, the Honor Codes, and the teachings that those who are wrongdoers or even know of wrongdoing are obligated to come forward and make full disclosure.

Hypocrisy about sexual conduct will undoubtedly continue to plague the military and disqualify some of its finest members from completing their careers, until some fundamental policy changes are adopted, and its sexual codes are made more realistic. From General Eisenhower on, up and down the ranks, even to Commander-in-Chief, there are many who would have had to forfeit their positions had the military's code of sexual conduct been strictly and honestly enforced. Instead, it is applied selectively, and frequently only when public whim or political pressures so dictate. The unfortunate few, ranging from highly qualified female Air Force Lieutenants to would-be Chiefs of Staff are the victims of a fickle public whose interest in the sexual conduct of members of the military waxes and wanes as other more titillating issues and events come to the forefront. However, those are matters for the military and the other branches of government to decide, not the courts. Hypocrisy and deception, if artfully practiced, do not offend the Constitution, at least not in most instances.

The government argues that "Don't Ask, Don't Tell" does not violate the free speech clause of the First Amendment because the speech is strong evidence of a "propensity to engage in homosexual acts" and that a "propensity"

somehow qualifies as prohibited conduct. More to the point, the part of the policy that regulates speech is based on a presumption that a declaration of status establishes a propensity to engage in conduct--ergo, conduct. The tenuous connection the government seeks to draw between speech and propensity (and then between propensity and conduct) cannot withstand scrutiny under the First Amendment. The difference between being a homosexual and saying one is a homosexual is precisely that--one has said what is a fact. The presumption that one who speaks truthfully is more likely to engage in prohibited conduct than one who conceals or lies about his homosexual status is plainly unsupportable. It is at least as likely that the homosexual who has acknowledged his sexual orientation, and who knows that everyone is aware of his preferences, will be willing to refrain from conduct that would lead to his discharge as it is that a homosexual who has successfully concealed his status, leads a covert and secretive life and hopes not to be discovered, will refrain from "illicit" encounters. There is simply no rational basis for the presumption that those who are honest have a greater propensity to commit homosexual acts than those who prefer to hide their sexual proclivities. The presumption is of course also flawed in its underlying premise that homosexual orientation involves only an "abstract sexual preference ... as distinct from a propensity." As I have stated earlier, there is nothing abstract about the human sex drive. The thesis that being a homosexual, or having a homosexual orientation, does not entail a propensity or proclivity for a particular form of sexual activity, but that acknowledging one's homosexual status does, is consistent with neither the facts of life nor the plain meaning of the English language. While these artificial concepts of "orientation," "preference," "abstract sexual preference," "propensity," "proclivity" may be sufficient to support the policy's status/conduct distinction, they are far too evanescent and subtle to serve as a basis for prohibiting or punishing speech of substantive import.

The military's final argument is that there is a safety valve for those who acknowledge their status. They are permitted to overcome the rebuttable presumption that they have a propensity to engage in homosexual acts. There are several reasons why I find this argument erroneous. I will mention three. First, as I have stated, the presumption itself is invalid. Therefore, one may not be required to rebut it. Second, the opportunity to rebut the presumption is illusory in most cases. It is not only unreasonable to ask military personnel to remain chaste throughout their careers, it is contrary to both human nature and military tradition. In fact, from the earliest days of our military, R & R has involved far more than listening to the Philharmonic, touring art galleries, or watching the ballet. The military has actively facilitated a multitude of opportunities for members of the armed forces to release their sexual tensions,

particularly, but hardly exclusively, when they are overseas. Third, the evidence the military has submitted regarding individual efforts to rebut the presumption raises serious doubts that the safety-valve serves any useful purpose whatsoever, notwithstanding the fact that on rare occasions an isolated service member has successfully availed himself of that procedure in order to escape discharge.

There can be no doubt that the "Don't Ask, Don't Tell" policy severely burdens speech. It unquestionably has the effect of chilling speech by homosexual service members--speech that is of tremendous importance to the individuals involved, speech that goes to their right to communicate the core of their emotions and identity to others. Given the regulation's provisions that permit homosexuals to serve in the armed forces, and that punish only homosexual conduct, there is no reasonable basis for prohibiting a service member from engaging in speech that serves only to declare his or her homosexual status.

Lieutenants Holmes and Watson will be discharged not because they have engaged in prohibited conduct and not because they are homosexual. Rather the military seeks to exclude them because they spoke openly of their homosexual status. The new "Don't Ask, Don't Tell" policy, while purporting to allow homosexuals to serve in this country's armed forces, unconstitutionally conditions their service on an abridgment of their free speech rights under the First Amendment. For that reason, I would hold the speech portion of "Don't Ask, Don't Tell" unconstitutional. [FN8]

FN8. The government does not argue that knowledge on the part of fellow service members of an individual's homosexual status would be sufficient in itself to warrant discharge in the absence of evidence of actual or threatened conduct. Accordingly, I will not address the arguments that might be advanced in support of such a contention other than to say that they would also fail to pass constitutional muster.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
APR - 6, 1998

Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

ANDREW HOLMES, First Lieutenant,
Plaintiff-Appellee,
v.
CALIFORNIA ARMY NATIONAL GUARD; TANDY BOZEMAN, Major, in his official capacity; PETE WILSON, Governor, in his official capacity; U.S. ARMY NATIONAL GUARD; UNITED STATES OF AMERICA; WILLIAM J. PERRY, Secretary of Defense,
Defendants-Appellants.

No. 96-15726

ANDREW HOLMES, First Lieutenant,
Plaintiff-Appellee,
CALIFORNIA ARMY NATIONAL GUARD; TANDY BOZEMAN, Major, in his official capacity; PETE WILSON, Governor, in his official capacity;
Defendants-Appellants.

No. 96-15855

RICHARD P. WATSON, Lieutenant,
Plaintiff-Appellant,
v.
WILLIAM J. PERRY, Secretary of Defense; John Dalton, Secretary of the Navy; UNITED STATES OF AMERICA,
Defendants- Appellees

No. 96-35314

ORDER

Before: REAVLEY,* REINHARDT, and WIGGINS, Circuit Judges.

* Hon. Thomas M. Reavley, Senior Unlted States Circuit Judge for the Fifth Circuit, sitting by designation.

Judges Reavley and Wiggins voted to deny plaintiff appellant's and plaintiff appellees's joint petition for rehearing and Judge Reinhardt voted to grant the petition for rehearing. Judge Wiggins recommends rejection of the suggestion for rehearing en banc and Judge Reinhardt votes to accept the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Holmes v. California Army Nat'l Guard; Holmes v. Cohen;
Watson v. Cohen --
Nos. 96-15726, 96-15855, 96-35314

PREGERSON, Circuit Judge, with whom Judges REINHARDT, KOZINSKI, HAWKINS and TASHIMA join, dissenting from denial of rehearing en banc.

I dissent from our failure to take en banc the opinion of a divided panel that now stands as the opinion of our court.

It is clear to me that the "Don't Ask/Don't Tell" policy imposes silence--not inaction--upon gay and lesbian service personnel: The words "Don't Ask" and "Don't Tell" forbid speech, not conduct.

Moreover, this restriction on speech is content-based because it penalizes gay and lesbian members of our armed forces for revealing one basic aspect of their identities, any time or any place. See 10 U.S.C. § 654(a)(9-10) (1997). And this restriction on speech violates the First Amendment because "[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than [by] silencing speech on the basis of its content." R.A.V. v. St. Paul, 505 U.S. 377, 392 (1992).

To make matters worse, the "Don't Ask/Don't Tell" policy imposes a viewpoint restriction on speech. Unlike their gay and lesbian counterparts, heterosexual military personnel may talk about their sexuality without

jeopardy. The Supreme Court has recognized that "[v]iewpoint discrimination is . . . an egregious form of content discrimination." Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995). Because the government may not favor one speaker's views over another's, even in private speech, see Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984), the "Don'tAsk/Don't Tell" policy presumptively offends the First Amendment When our military applies invasive restrictions on the first amendment rights of our service personnel, it must do so "objectively and evenhandedly." Greer v. Spock, 424 U.S. 823, 839 (1976). The "Don't Ask/Don't Tell" policy violates that principle.

From another perspective, as a practical matter the silence that this policy imposes on gay and lesbian military personnel can lead others to presume that they assent to a view about their own sexuality that they do not espouse. The Supreme Court has invalidated laws that forced tacit speech on other groups. See, e.q., Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 574-76 (1995) (declining to force parade organizers to propound a message about Irish sexual identity that they rejected); Lee v. Weisman, 505 U.S. 577, 593 (1992) (striking down religious invocation at school because "in our culture . . . remaining silent can signify adherence to a view"); Wooley v. Maynard, 430 U.S. 705, 715 (1977) (enjoining New Hampshire from compelling Jehovah's Witnesses to display the motto "Live Free or Die" on their license plates).

A person who has taken an oath to protect and defend the Constitution of the United States should not be denied that privilege simply because that person wishes to make a statement about his or her innermost seif. It seems to me that such speech, which is truthful and neither harms nor endangers anyone, is shielded by the First Amendment.

APPENDIX C

(918 F.Supp. 1403)

Lieutenant Richard P. WATSON, Plaintiff,
v.
William J. PERRY, Secretary of Defense, et al., Defendants.

No. C95-1141Z.

United States District Court,
W.D. Washington.

March 7, 1996.

BACKGROUND

Plaintiff Richard Watson is currently a lieutenant in the United States Navy. Lt. Watson enlisted in the Navy in July 1981. A year later, the Navy selected Lt. Watson to participate in the Enlisted Commissioning Program, under which highly qualified enlisted personnel may achieve officer status. Under this program, Lt. Watson attended the University of New Mexico, obtaining a Bachelor of Science degree in mathematics in August 1986. After completing Officer Candidate School, Naval Nuclear Power School, and the Submarine Officer Basic Course, Lt. Watson served aboard the U.S.S. Henry M. Jackson from September 1988 until September 1992. During this period, Lt. Watson received many honors including a Letter of Commendation from the Commanding Officer of the U.S.S. Henry M. Jackson, the National Defense Service Medal for Service on Active Duty, the Navy Achievement Medal for "Professional Achievement in the Superior Performance of His Duties," and a Gold Star in lieu of a second Navy Achievement Medal.

From September 1992 until March 1995, Lt. Watson served as an Assistant Professor of Naval Science in the Naval Reserve Officers Training Corps (NROTC) at Oregon State University. During this period, Lt. Watson sought to obtain a Masters Degree in Business Administration, which he viewed as necessary for continued promotion and advancement in the Navy.

On October 28, 1994, Lt. Watson delivered to his Commanding Officer a one-page document titled "Submission of Sexual Orientation Statement." Paragraph 2 reads: "I have a homosexual orientation. I do not intend to rebut the presumption." Lt. Watson explains in his declaration that he submitted the

statement (1) because of his commitment to honesty, truthfulness, and integrity, and (2) to eliminate any potential for a blackmail threat in the event he received a vessel command assignment. Based on this letter, the Navy issued a show cause order requiring Watson to show cause before a Board of Inquiry why he should be retained in the Naval Service.

On March 1, 1995, a Navy Board of Inquiry was convened. Although the Board reminded Watson that to avoid discharge he would have to rebut the presumption that he engages in or intends to engage in homosexual acts, Watson presented no such evidence. Instead, he recounted his many accomplishments during fourteen years of military service and emphasized his commitment to the Navy and its core values. Watson's counsel argued to the Board that Watson's statement, "I do not intend to rebut the presumption" was made without the assistance of counsel and without full understanding of "what a presumption is." The Board concluded that although they had no doubt that Watson was "an outstanding performer," he failed to offer any evidence to rebut the presumption. As a result, the Board voted 3 to 0 to recommend the honorable discharge of Lt. Watson "by reason of homosexual conduct."

On March 28, 1995, Lt. Watson's civilian counsel submitted a letter of deficiency for consideration by the Commander of Naval Base Seattle and the Board of Review in their review of the Board of Inquiry's recommendation. The letter included the following statement by Lt. Watson:

> a. I expressly deny that I have engaged in any homosexual conduct with any military student or service member.
>
> b. I expressly deny that I engaged in any homosexual conduct during the performance of military duty, or while on any military installation.
>
> c. I expressly deny that I have any intent or propensity to engage in any conduct described above.

In April 1995, the Commander of Naval Base Seattle issued a report in which he approved and concurred in the Board of Inquiry's findings, and recommended to the Chief of Naval Personnel that Watson be separated from service. The Commander concluded that Watson's letter of deficiency failed to rebut the presumption and was, in fact, "persuasive as much for what it does not deny as for what it does." The "Don't Ask, Don't Tell" policy "appl[ies] to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty." 10 U.S.C. § 654(a)(10). Thus, homosexual conduct that requires separation from service is not limited to the circumstances addressed

in Watson's letter of deficiency, namely off duty, off base conduct with non-military personnel. Because Watson was silent as to his intent or propensity to engage in homosexual conduct under circumstances other than described in his statement, the Commander concluded that his statement supported, rather than rebutted, the presumption.

The Commander also rejected Watson's argument, made to the Board of Inquiry, that his initial statement, "I do not intend to rebut the presumption" was made "without any counseling from lawyers," and therefore should be construed only as a statement that he did not want an embarrassing inquiry into his private life. The Commander concluded that Watson's legal ignorance was substantially contradicted by his statement that he sent copies of his declaration to various officials and interest groups on the advice of his lawyer.

On May 2, 1995, the Board of Review voted unanimously to recommend Watson's separation from service with an honorable discharge. In June 1995, the Navy sent Lt. Watson a Notice of Discharge and an amended Notice of Discharge. The amended Notice of Discharge informed Lt. Watson that he would receive 50% of the standard separation pay.

On July 25, 1995, Lt. Watson initiated this action against Secretary of Defense William J. Perry, Secretary of the Navy John E. Dalton, and the United States. In this action, Lt. Watson challenges the constitutionality of the Policy Concerning Homosexuality in the Armed Forces (colloquially known as the "Don't Ask, Don't Tell" policy), 10 U.S.C. § 654, and the Department of Defense regulations promulgated thereunder. The statute provides in relevant part as follows:

> (b) Policy.--A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved ...
>
> (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding ... that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
>
> (f) Definitions.--In this section:
>
> (1) The term "homosexual" means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms "gay" and "lesbian".
>
> 10 U.S.C. § 654.

Department of Defense Directive 1332.30 further defines a "statement that a member is a homosexual or bisexual or words to that effect" as [l]anguage or behavior that a reasonable person would believe was intended to convey the statement that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.

Definitions 18, Department of Defense (DOD) Directive. The Directive also defines "sexual orientation" as "[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts." Id. ¶ 16. The Directive states that "[a] member's sexual orientation is considered a personal and private matter, and is not a bar to continued service ... unless manifested by homosexual conduct in the manner described in section C.1." Reasons for Separation § C, at p. 2-1. Section C.1.b. repeats the language of 10 U.S.C. § 654(b)(2), and further provides:

A statement by an officer that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.... In determining whether an officer has successfully rebutted the presumption ..., some or all of the following may be considered:

(1) Whether the officer has engaged in homosexual acts;

(2) The officer's credibility;

(3) Testimony from others about the officer's past conduct, character, and credibility;

(4) The nature and circumstances of the officer's statement;

(5) Any other evidence relevant to whether the officer is likely to engage in homosexual acts.

DOD Directive, Reasons for Separation, § C.1.b., at p. 2-2.

Lt. Watson challenges the "Don't Ask, Don't Tell" policy on First (Free Speech) and Fifth (Equal Protection and Due Process) Amendment grounds, and brings a claim under the Administrative Procedure Act (APA) challenging the Navy's refusal to provide him with full separation pay. With his complaint, Lt. Watson filed a motion for a temporary restraining order and a preliminary injunction, docket no. 2. On August 8, 1995, after hearing oral argument, the Court issued a preliminary injunction enjoining the Navy from discharging Watson or taking any adverse action against him pending the outcome of this litigation.

The parties now move for summary judgment. Lt. Watson claims that the "Don't Ask, Don't Tell" policy violates the due process and equal protection clauses of Fifth Amendment because it is based solely on prejudice against homosexuals and discriminates, without any rational justification, against homosexual servicemembers on the basis of status alone. Watson argues further that the "Don't Ask, Don't Tell" policy is aimed at suppressing protected speech and therefore cannot withstand First Amendment scrutiny.

The Government counters that it is constitutionally permissible for the armed forces to prohibit homosexual conduct, which is the aim of the "Don't Ask, Don't Tell" policy. The Government emphasizes that the policy is "conduct based," excluding only those servicemembers who engage in homosexual conduct or who make statements demonstrating that they have engaged or are likely to engage in homosexual conduct. As to plaintiff's First Amendment argument, the Government contends that servicemembers who are discharged based on their declarations of homosexuality are not being punished for their speech; rather, the Government is using the statement as evidence of prohibited homosexual conduct.

DISCUSSION

I. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Here, there are no material issues of fact in dispute. The parties disagree only on the application of the law to these facts. As a result, this case is ripe for summary adjudication.

II. Deference to the Military

As this Court recognized in Cammermeyer v. Aspin, 850 F.Supp. 910, 915-916 (W.D.Wash.1994), courts reviewing constitutional challenges to military actions must be mindful of the special level of deference accorded military decisions. While there is no "military exception" to the Constitution, "[r]egulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessities." Beller v. Middendorf, 632 F.2d 788, 811 (9th Cir.1980), cert. denied, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1981).

The Constitution confers broad powers on the President and Congress to raise and support armies, provide and maintain a naval force, and promulgate

rules governing and regulating both land and naval forces. Traditionally, courts have recognized the Constitution's mandate by according significant deference to the "considered professional judgment" of military officials regarding the composition of the armed forces. Goldman v. Weinberger, 475 U.S. 503, 508, 106 S.Ct. 1310, 1313, 89 L.Ed.2d 478 (1986). "While it is clear that one does not surrender his or her constitutional rights upon entering the military, the Supreme Court has repeatedly held that constitutional rights must be viewed in light of the special circumstances and needs of the armed forces." Beller, 632 F.2d at 810. As the Supreme Court has reflected:

> "[It] is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." Rostker v. Goldberg, 453 U.S. 57, 65-66, 101 S.Ct. 2646, 2652, 69 L.Ed.2d 478, 487 (1981) (quoting Gilligan v. Morgan, 413 U.S. 1, 10, 93 S.Ct. 2440, 2446, 37 L.Ed.2d 407 (1973)).

The plaintiff has argued forcefully and persuasively that gay and lesbian servicemembers have served honorably in the military for years; that gay and lesbian servicemembers are currently serving with distinction, without disrupting order and good discipline; that one's sexuality is a personal and private matter; and that prejudice is at the heart of the military's policy concerning gays and lesbians in the military. The Court has no doubt that many gays and lesbians have served and continue to serve this country honorably, without impeding the goals of the military, and that many other servicemembers would like to see homosexuals ousted merely because of their sexual preference. This Court is not permitted, however, to substitute its own judgment for that of Congress and the military or to question the wisdom of the military's policy. The policy must be upheld so long as it is constitutional. It is also not within this Court's power to revisit legal issues conclusively resolved by the Supreme Court in-Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). [FN1] See also Meinhold v. U.S. Dept. of Defense, 34 F.3d 1469, 1477 (9th Cir.1994). As a result, the Court must reject the argument that homosexual conduct cannot be proscribed by the military. Consistent with the principles of deference to the military and binding precedent, the Court's task is limited to determining whether the policy unconstitutionally infringes on Lt. Watson's constitutional rights as considered in the context of the military. [FN2]

FN1. Hardwick involved a due process challenge to a Georgia statute which made sodomy a crime. Hardwick challenged the statute after being

discovered engaging in sodomy with another consenting adult in the privacy of his own home. The Supreme Court held that the Constitution confers no fundamental right upon homosexuals to engage in sodomy.

FN2. The "Don't Ask, Don't Tell" policy has been challenged on constitutional grounds in several cases. The policy has been upheld as applied in Richenberg v. Perry, 909 F.Supp. 1303 (D.Neb.1995) (Captain in the Air Force was discharged for stating he is a homosexual); Philips v. Perry, 883 F.Supp. 539 (W.D.Wash.1995) (Petty Officer was discharged for stating he engaged in homosexual acts and was a homosexual); and Selland v. Perry, 905 F.Supp. 260 (D.Md.1995) (Lieutenant in the Navy was discharged for making statement that he was homosexual and involved in a monogamous relationship). Only one court has held that the policy is facially invalid on equal protection, due process, and First Amendment grounds. See Able v. United States, 880 F.Supp. 968 (E.D.N.Y.1995) (six members of the Armed Services made statements of homosexual orientation). Several of these cases are currently on appeal.

III. Must Lt. Watson Exhaust His Administrative Remedies?

The defendant argues that this Court should require Watson to exhaust intramilitary remedies before adjudicating his constitutional claims. In Meinhold, the Ninth Circuit rejected a similar argument by the Government, noting that appeal to the Board for the Correction of Naval Records (BCNR) would have been futile. The Court concluded that because the Navy's position was that the Board had to recommend separation if it found Meinhold to be homosexual, and that a servicemember is homosexual if he makes a statement that he is, there would be no grounds on which the BCNR could reach a different disposition than the Board. The same reasoning applies here. Because Watson failed to submit any evidence to rebut the presumption, there would be no basis for the BCNR to reach a contrary result. As a result, the Court concludes that exhaustion is not required because further administrative proceedings would be futile.

The Court also concludes that constitutional review is not precluded by the Administrative Procedure Act ("APA"). In Darby v. Cisneros, 509 U.S. 137, 137, 113 S.Ct. 2539, 2540, 125 L.Ed.2d 113, 127 (1993), the Supreme Court held that "where the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." (Emphasis in original). Because appeal to the Board for the Correction of Naval Records is discretionary, not

mandatory, Watson is not precluded from bringing claims under the APA. See 10 U.S.C. § 1552.

FN3. Lt. Watson clarified in his briefs that his sole claim under the APA relates to the Navy's failure to award him full separation pay, which becomes an actual controversy only if he is eventually discharged. Plaintiff is not bringing a claim under the APA based on the Navy's actions in discharging him because he does not believe the Navy exceeded or acted contrary to statutory authority. Watson contends that the Navy acted in conformity with, rather than against, the policy and regulations at issue here. Because it is the policy and regulations themselves which are allegedly unconstitutional, plaintiff contends he has no APA claim based on the agency's adherence to that policy; instead, "the only route towards plaintiff's objective, i.e., to remain in the Navy, is consideration of his constitutional claims." Plaintiff's Brief in Support of Summary Judgment at 19.

IV. Equal Protection Challenge

A. Standard

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 320 (1985) (quoting Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982)). While the Fifth Amendment does not contain an equal protection clause, the due process clause of the Fifth Amendment has an equal protection component that applies to the federal government. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

The Ninth Circuit has held that homosexuals are not a suspect or quasi-suspect class for equal protection purposes; therefore, judicial review of a classification based on homosexuality is limited to the rational basis test. High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir.1990). Under this standard, a discriminatory classification is presumed valid and will be sustained "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Heller v. Doe, 509 U.S. 312, 312, 113 S.Ct. 2637, 2638-39, 125 L.Ed.2d 257, 270 (1993).

Rational basis review is a two-step process. Jackson Water Works, Inc. v. Public Utilities Comm'n, 793 F.2d 1090, 1094 (9th Cir.1986), cert. denied, 479 U.S. 1102, 107 S.Ct. 1334, 94 L.Ed.2d 184 (1987). Initially, the court

must determine whether the challenged classification serves a legitimate governmental purpose. If the court answers this question in the affirmative, the court must then determine whether the discriminatory classification is rationally related to the achievement of that legitimate purpose. A discriminatory classification that is based on prejudice or bias is not rational as a matter of law. See Palmore v. Sidoti, 466 U.S. 429, 433- 34, 104 S.Ct. 1879, 1882-83, 80 L.Ed.2d 421, 426 (1984) (mother could not be denied custody of her child based on social disapproval of her interracial marriage); Cleburne, 473 U.S. at 448, 105 S.Ct. at 3259, 87 L.Ed.2d at 326 (city could not require a special use permit for group home for the mentally retarded where the requirement was based on prejudice).

Plaintiff does not dispute that the government has a legitimate interest in maintaining the readiness and combat effectiveness of its military forces. Thus, the first part of the test is satisfied. The parties disagree, however, as to the second part of the test--whether the classification is rationally related to that purpose.

B. Is the Policy Unconstitutional on its Face?

In Meinhold, 34 F.3d at 1478, the Ninth Circuit, in addressing the equal protection implications of the military's former policy concerning homosexuals in the armed forces, recognized that equating status with conduct or acts that are prohibited is "problematic," and questioned whether it could ever be "rational to presume that one class of persons (identified by their sexual preference alone) will violate regulations whereas another class (identified by their preference) will not." The court avoided reaching the constitutional question, however, because it construed the former policy as permitting discharge from service only where the servicemember makes "statements that show a concrete, fixed, or express desire to commit homosexual acts." Id. at 1479. The court found that Meinhold's statement, "I am in fact gay," manifested no concrete, expressed desire to commit homosexual acts, and therefore his discharge on the basis of that statement alone could not stand.

Lt. Watson contends that the military's new "Don't Ask, Don't Tell" policy, codified at 10 U.S.C. § 654, suffers from the constitutional infirmities recognized in Meinhold, in that it presumes, without any rational basis, that servicemembers who merely state their homosexual orientation will engage in prohibited conduct. Watson notes that no such presumption attaches to statements of servicemembers who declare their heterosexual orientation. Although the presumption of homosexual conduct is rebuttable, plaintiff contends that it is virtually impossible for servicemembers to rebut that

presumption without explicitly retracting their statements and repudiating their own sexual identity.

Watson argues that because the express language of the statute offends Meinhold, the new policy is unconstitutional on its face and must be struck down. Plaintiff's claims of facial invalidity are based on § 654(b)(2) of the policy, which provides for separation from service where:

> the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

Plaintiff contends that this language permits discharge based solely on statements of sexual orientation, which is constitutionally suspect under Meinhold, 34 F.3d at 1478, and no other redeeming construction of the policy is possible.

Courts are obligated to consider nonconstitutional claims and avenues for relief prior to considering constitutional claims. Jean v. Nelson, 472 U.S. 846, 854, 105 S.Ct. 2992, 2996-97, 86 L.Ed.2d 664 (1985). In addition, with limited exceptions, facial challenges to statutes must be rejected unless there exists no set of circumstances in which the statute can constitutionally be applied. [FN4] United States v. Salerno, 481 U.S. 739, 745, 107 S Ct. 2095, 2100, 95 L.Ed.2d 697 (1987). "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." Broadrick v. Oklahoma, 413 U.S. 601, 610, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973). A corollary rule is that constitutional rights are personal and may not be asserted vicariously. These principles reflect "the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." Id., 413 U.S. at 610-611, 93 S.Ct. at 2915. In accordance with these principles, this Court must consider whether there is some construction of the statute embodying the "Don't Ask, Don't Tell" policy that is constitutional. Meinhold, 34 F.3d at 1476-79.

FN4. The Supreme Court described these limited exceptions in Broadrick v. Oklahoma, 413 U.S. 601, 611-612, 93 S.Ct. 2908, 2915-16, 37 L.Ed.2d 830 (1973). One exception is a facial challenge based on First Amendment free- speech grounds. The Supreme Court has applied to statutes restricting

speech the "overbreadth doctrine," which renders a statute invalid in all its applications if it is invalid in any of them. Lt. Watson's challenge to the statute on First Amendment grounds is addressed separately.

Under the statute, a servicemember's statement "that he or she is a homosexual or bisexual, or words to that effect," triggers a presumption that he or she engages in or has the intent or propensity to engage in prohibited homosexual conduct. The words "homosexual" and "bisexual," however, are defined terms. "Homosexual" is defined as "a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms 'gay' and 'lesbian'." 10 U.S.C. § 654(f)(1). "Bisexual" is defined as "a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts." 10 U.S.C. § 654(f)(2). As evident from their definitions, the words "homosexual" and "bisexual" as used in the statute connote homosexual conduct or a propensity to engage in proscribed homosexual conduct.

The DOD Directive similarly requires that the servicemember's statement concerning homosexuality be tied to prohibited conduct or an intent to engage in such conduct. The DOD Directive provides that a servicemember's statement that he or she "is a homosexual or bisexual, or words to that effect," means "[l]anguage or behavior that a reasonable person would believe was intended to convey the statement that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts." DOD Directive at 1-2. Thus, under the Directive a statement cannot trigger discharge unless it demonstrates an intent or propensity to engage in prohibited homosexual conduct.

The statute and regulations also distinguish identifying oneself as "homosexual or bisexual, or words to that effect" from statements of "homosexual orientation." "Homosexual orientation" is defined in the DOD Directive as "[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts." Given these definitions, the statute and regulations can be reasonably construed as reaching only statements manifesting "a concrete, expressed desire to commit homosexual acts," Meinhold, 34 F.3d at 1479, not statements of homosexual orientation or status alone.

Plaintiff reads the statute as explicitly providing that the mere statement, "I am homosexual" or "I am gay" triggers discharge, which would be constitutionally impermissible under Meinhold. While this is one possible construction of the statute, it ignores the definitional sections and regulations,

which make actionable only statements, language or acts demonstrating an intent or propensity to engage in prohibited homosexual conduct. Given the definitions in the statute and regulations, § 654(b)(2)' s reference to statements that "he or she is homosexual or bisexual" can refer only to statements manifesting an intent or propensity to engage in prohibited conduct. Under this construction, the presumption would not arise from mere statements of orientation, such as "I have a homosexual orientation." Thus, the statute may be construed in a constitutional manner and is facially valid.

To the extent the Government has initiated discharge proceedings on the basis of more problematic statements such as "I am homosexual," the proper challenge is on an as-applied, rather than a facial, basis.

FN5. Whether it would be constitutionally proper in a particular case to initiate discharge proceedings based on such a statement would depend on whether the speaker is acknowledging that he or she is "homosexual" as that term is defined by the statute or rather merely expressing his or her orientation. A reasonable constitutional construction of the statute would not permit the presumption to be created by the statement, "I am homosexual" alone unless it was clear that the speaker was defining himself or herself in accordance with the statutory definition or otherwise manifesting an intent to engage in homosexual acts. The Court need not reach that issue here because Watson's as-applied challenge is limited to his own statements.

The question still remains whether the statute was constitutionally applied to Lt. Watson. The Ninth Circuit has held that the military may constitutionally discharge members for homosexual conduct, as distinguished from mere status or orientation:

On the merits, we defer to the Navy's judgment that the presence of persons

> who engage in homosexual conduct, or who demonstrate a propensity to engage in homosexual conduct by their statements, impairs the accomplishment of the military mission.

Meinhold, 34 F.3d at 1472 (emphasis added). The Meinhold court held that a service person's statements would justify discharge if such statements showed a concrete, expressed desire or intent to commit homosexual acts. Id. Because homosexual conduct may constitutionally be prohibited, administrative discharges based on propensity or intent to engage in homosexual acts, as evidenced by the servicemembers' statements, do not violate equal protection. Id.; see also Philips v. Perry, 883 F.Supp. 539, 545-46 (W.D.Wash.1995).

In arguing that his discharge was unconstitutional, plaintiff focuses on his initial statement that he has a "homosexual orientation," and argues that under Meinhold that statement alone cannot constitutionally create a presumption of homosexual conduct. That is true. However, Watson's statement was not limited to a declaration of his homosexual orientation. Plaintiff's complete statement was "I have a homosexual orientation. I do not intend to rebut the presumption." While the first sentence cannot under the statute or regulations, as constitutionally construed, be sufficient to raise the presumption, the second sentence could reasonably be interpreted by the Navy as a statement regarding conduct. Watson's statement that he does not intend to "rebut the presumption" can only refer to the presumption in the statute that "the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." Thus, the Navy could reasonably interpret Watson's statement that he would not rebut the presumption as a statement that the presumption is properly applied to him.

Watson argues that the second sentence of his statement should be given no effect because, among other reasons, it could also be reasonably interpreted as a statement that he did not want his private life scrutinized and therefore would refuse to discuss any personal sexual matters. Watson is correct that his statement is susceptible to that interpretation. However, the appropriate question is whether it was reasonable and rational for the Navy to interpret the statement otherwise. The Court concludes that it was.

Watson also argues that because he merely acknowledged his homosexual "orientation," and it is unconstitutional to attach a presumption of conduct to such a statement, Watson's statement that he would not rebut the presumption is ineffective. Watson's use of the term "orientation" cannot shield him, however, from the effects of making further statements he was not compelled to make. Watson's statement that he would not rebut the presumption could reasonably be understood as a statement that the presumption was properly applied to him. This additional comment puts him on a different footing than if he had limited his statement to orientation alone.

Even if Watson's first statement was read as a mere acknowledgment of orientation, which could not under Meinhold constitutionally trigger the presumption of conduct, his later statement to the Board of Review in which he denied having engaged in any homosexual conduct with any military student or servicemember, and denied engaging in any homosexual conduct during the performance of military duty or while on any military installation, was sufficient to create a presumption that he has engaged in or has an intent to engage in homosexual conduct with non-servicemembers while off base

and off duty. Such conduct may be constitutionally prohibited, is expressly proscribed by the regulations, and provides sufficient grounds for separation.

It is well recognized that adverse inferences may properly be drawn from silence by parties in civil cases. Baxter v. Palmigiano, 425 U.S. 308, 319, 96 S.Ct. 1551, 1558, 47 L.Ed.2d 810 (1976) ("[f]ailure to contest an assertion ... is considered evidence of acquiescence ... if it would have been natural under the circumstances to object to the assertion in question"). The case most frequently cited for this principle is United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 153-54, 44 S.Ct. 54, 55-56, 68 L.Ed. 221, 224 (1923), an immigration case, in which Justice Brandeis stated, "Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character." The Court went on to state:

> Conduct is often capable of several interpretations, and caution should be exercised in drawing inferences from it. But there is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak. Deportation proceedings are civil in their nature. Id.; accord, I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1043-44, 104 S.Ct. 3479, 3485-86, 82 L.Ed.2d 778, 789 (1984). The plaintiff contends that Bilokumsky is inapplicable here because it is an immigration case, but the principle has been applied in other civil contexts. See, e.g., Daniels v. Pipefitters' Assn. Local Union No. 597, 983 F.2d 800, 802 (7th Cir.1993) (an adverse inference could have been drawn from the invocation of the Fifth Amendment in a civil case involving racial discrimination); Cumpiano v. Banco Santander Puerto Rico, 902 F.2d 148, 158 (1st Cir.1990) (human resource manager's refusal to give employee any reason for termination, other than stating he did not wish to discuss things she already knew, was evidence of the Company's discriminatory animus toward pregnant employee).

Because the Navy could properly draw an adverse inference from Watson's selective omission of any reference to off base, off duty conduct with non- military personnel, there is no basis for finding the statute was unconstitutionally applied to him. [FN6] He was not discharged solely for acknowledging his sexual orientation, but rather for making statements manifesting an intent or propensity to engage in proscribed homosexual conduct. Even where presumptions of one fact from evidence of another are codified in civil statutes, such presumptions are upheld where "there is some rational connection between the fact proved and the ultimate fact presumed," and the inference of one fact from proof of another is not "so unreasonable as to be a purely arbitrary mandate." Usery v. Turner Elkhorn Mining Co., 428

U.S. 1, 28, 96 S.Ct. 2882, 2898, 49 L.Ed.2d 752 (1976). There is no basis for finding that the inference drawn by the Navy from Watson's statement was unreasonable or arbitrary.

V. Due Process

Watson contends that his discharge based on statements concerning his homosexual orientation violates his right to substantive due process under the Fifth Amendment. Watson argues that the government's goal of force readiness is not rationally related to "a policy that systematically discharges servicemembers regardless of their contribution to force readiness." Plaintiff's Opening Brief at 38 (emphasis in original).

The due process clause of the Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend V. The due process clause "contains a substantive component, sometimes referred to as 'substantive due process,' which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them.' " Daniels v. Williams, 474 U.S. 327, 337, 106 S.Ct. 677, 677, 88 L.Ed.2d 662, 672 (1986) (Stevens, J., concurring). The substantive due process clause "serves to prevent governmental power from being 'used for purposes of oppression.' " Id. at 331, 106 S.Ct. at 665, 88 L.Ed.2d at 668 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 277, 15 L.Ed. 372 (1856)). Although courts approach equal protection and due process analyses differently, there are similarities in the doctrines:

When conduct, either by virtue of its inadequate foundation in the continuing traditions of our society or for some other reason, such as lack of connection with interests recognized as private and protected, is subject to some government regulation, then analysis under the substantive due process clause proceeds in much the same way as analysis under the lowest tier of equal protection scrutiny. A rational relation to a legitimate government interest will normally suffice to uphold the regulation. At the other extreme, where the government seriously intrudes into matters which lie at the core of interests which deserve due process protection, then the compelling state interest test employed in equal protection cases may be used by the Court to describe the appropriate due process analysis. Beller, 632 F.2d at 808 (citing Roe v. Wade, 410 U.S. 113, 155, 93 S.Ct. 705, 727, 35 L.Ed.2d 147 (1973); Griswold v. Connecticut, 381 U.S. 479, 497, 85 S.Ct. 1678, 1688, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring); Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942)). Thus, when a classification penalizes the exercise of a fundamental constitutional right, heightened

scrutiny is required. Reno v. Flores, 507 U.S. 292, 301-03, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1, 16 (1993); High Tech Gays, 895 F.2d at 572. On the other hand, where a regulation impairs a lesser interest, there need only be a rational relationship between the challenged regulation and a legitimate governmental purpose. Flores, 123 L.Ed.2d at 18. Because the Supreme Court has held that there is no fundamental right to engage in homosexual conduct, Hardwick, 478 U.S. 186, 106 S.Ct. 2841, the policy must be upheld if there is a rational relationship between the policy and a legitimate governmental purpose. Plaintiff's substantive due process claim rises and falls with his equal protection claim because they both require a rational relationship between the policy and the government's interest. Under Meinhold, discharge for homosexual conduct or for statements evidencing an intent or propensity to engage in homosexual conduct is constitutionally permissible. As a result, plaintiff's substantive due process claim must be rejected for the same reasons his equal protection claim fails.

VI. First Amendment

Watson contends that the policy and regulations violate his rights of freedom of speech and association as guaranteed him by the First Amendment, both on its face and as applied to him in particular. The plaintiff claims that the policy infringes on the First Amendment because it is a content-based restriction on speech. He further argues that because the "Don't Ask, Don't Tell" policy is explicitly aimed at silencing certain kinds of speech, it is presumptively invalid and the government has a much higher burden to justify this policy under the First Amendment than it did to justify the former policy at issue in Pruitt, which was found not to violate the First Amendment.

Lt. Watson all but ignores that First Amendment challenges of military regulations are subject to a different analysis than those brought in a civilian context. "The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." Goldman, 475 U.S. at 507, 106 S.Ct. at 1313.

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission require a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it. Parker v. Levy, 417 U.S. 733, 758, 94 S.Ct. 2547, 2551, 41 L.Ed.2d 439, 459

(1974). Thus, "[judicial] review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." Goldman, 475 U.S. at 508, 106 S.Ct. at 1313.

Applying principles of military deference, the Supreme Court has upheld an Air Force regulation that precluded an Orthodox Jew and ordained rabbi from wearing a yarmulke ("the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations"); Goldman, 475 U.S. 503, 106 S.Ct. at 1310; upheld articles of the Uniform Code of Military Justice punishing an Army officer for making public statements urging African-American servicemembers not to go to Viet Nam if ordered to do so; Parker, 417 U.S. 733, 94 S.Ct. 2547; and upheld United States Air Force regulations requiring servicemembers to obtain approval from their commanders before circulating petitions to Members of Congress; Brown v. Glines, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980). The lesson of these cases is that the servicemember's interests in autonomy, self-identity, and political expression are subordinate to the interest of the military in good order and discipline, morale, unit cohesion, and combat readiness.

The military's "Don't Ask, Don't Tell" policy is not facially invalid on First Amendment grounds. There is no question that the policy affects speech and inhibits speech to a limited extent. But the policy does not seek to punish speech itself but rather uses speech as evidence of intent or propensity to engage in conduct that the military may constitutionally prohibit. As a result, the policy affects speech "only incidentally, in the course of pursuing other legitimate goals." Ben-Shalom v. Marsh, 881 F.2d 454, 462 (7th Cir.1989), cert. denied, 494 U.S. 1004, 110 S.Ct. 1296, 108 L.Ed.2d 473 (1990). See also Richenberg, 909 F.Supp. at 1310.

The Ninth Circuit has consistently held that military regulations requiring discharge of servicemembers who merely state their homosexuality do not implicate First Amendment concerns. Courts have reasoned that the servicemember is not being discharged for his or her speech, but rather for his or her status as a homosexual. See Pruitt, 963 F.2d at 1163- 64; Schowengerdt v. United States, 944 F.2d 483, 489 (9th Cir.1991), cert. denied, 503 U.S. 951, 112 S.Ct. 1514, 117 L.Ed.2d 650 (1992). See also Philips, 883 F.Supp. at 547. Admissions of homosexuality, "like most admissions, [are] made in speech, but that does not mean that the first amendment precludes the use of the admission as evidence of the facts admitted." Pruitt, 963 F.2d at 1164.

The Navy's use of Watson's statements does not violate the First Amendment. While the government may not rely on information that would impinge on First Amendment rights if there is no connection between the information sought and the government's interest, Dawson v. Delaware, 503 U.S. 159, 167, 112 S.Ct. 1093, 1099, 117 L.Ed.2d 309 (1992), where such a connection does exist, the information may be used even though communicated by speech or expressive activity. The Supreme Court recently held in the criminal context that "[t]he First Amendment ... does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." Wisconsin v. Mitchell, 508 U.S. 476, 489, 113 S.Ct. 2194, 2201, 124 L.Ed.2d 436 (1993). As the district court in Thomasson v. Perry, 895 F.Supp. 820, 824 (E.D.Va.1995), noted, if this holds true in the criminal context, it is certainly applicable in the civil context, where the litigant is not afforded the same constitutional protections as a criminal defendant. Here, the Navy reasonably construed Watson's statements as demonstrating a propensity or intent to commit prohibited homosexual acts. As a result, his discharge was based on evidence of conduct, not speech, and the First Amendment is not implicated.

CONCLUSION.

Because the Navy could properly infer from Watson's statements that he had engaged in or had an intent or propensity to engage in homosexual conduct, his constitutional rights were not violated by his discharge from military.

IT IS SO ORDERED.

APPENDIX D

(920 F.Supp.1510)

First Lieutenant Andrew HOLMES, Plaintiff,
v.
CALIFORNIA ARMY NATIONAL GUARD; Major Tandy K. Bozeman, in his official capacity; Governor Pete Wilson, in his official capacity; United States Army National Guard; United States of America; and William J. Perry, Secretary of Defense, in his official capacity, Defendants.

No. C 95-688 SBA.

United States District Court,
N.D. California.

March 29, 1996.

Todd E. Thompson, [FN*] L. Jay Kuo,* Howard, Rice, Nemerovski, Canady, Falk & Rabin, San Francisco, CA, Paul Freud Wotman, * Law Offices of Paul Wotman, San Francisco, CA, for plaintiff.

FN* Appeared and argued motions.

Frank W. Hunger, Assistant Attorney General, Mark T. Quinlavin, Special Asst. United States Attorney,* U.S. Dept. of Justice, Washington D.C., for defendants United States Army National Guard, United States of America, William J. Perry, Secretary of Defense.

Daniel E. Lungren, Attorney General of the State of California, Andrew F. Loomis, Deputy Attorney General,* Sacramento, CA, for defendants California Army National Guard, Major Tandy K. Bozeman, Governor Pete Wilson.

ORDER

ARMSTRONG, District Judge.

OVERVIEW

Plaintiff, First Lieutenant Andrew Holmes ("plaintiff" or "Lt. Holmes") brings this action to challenge his discharge from the California Army National Guard ("CANG") and the United States Army National Guard ("USANG"). Lt. Holmes was expelled from service pursuant to the military's current policy governing homosexuals after plaintiff acknowledged his homosexuality to his commanding officer. Plaintiff has named two sets of defendants; the USANG, the United States of America, William J. Perry, and Secretary of Defense (collectively referred to as the "Federal defendants"), and the CANG, Major Tandy Bozeman, and Governor Pete Wilson (collectively referred to as the "California defendants"). His amended complaint alleges claims based on state and federal law.

Presently before the Court are: (1) the California defendants' Motion to Dismiss First Amended Complaint Pursuant to Rules 12(b)(6) and 12(e); (2) the Federal defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment; (3) and plaintiff's Cross-motion for Summary Adjudication as to Federal Defendants and Motion for Summary Adjudication as to California Defendants. Having read the papers filed in connection with these motions and considered the arguments of counsel, the Court GRANTS IN PART AND DENIES IN PART each of the parties' motions.

BACKGROUND

I. Military Policy Regarding Gays

The United States Military has a long history of precluding homosexuals from serving in this country's armed forces. It was not until 1981, however, that the Department of Defense formalized its policy with the implementation of revised DOD Directive 1332.14 (1981) which mandated the discharge of all known homosexuals from military service. Through this Directive, the military officially stated for the first time that "[h]omosexuality is incompatible with military service." DOD Directive 1332.14 (1981).

On July 19, 1993, President Clinton announced a new compromise policy regarding homosexuals in the military. [FN1] The principal elements of this new policy were enacted by Congress in the National Defense Authorization Act of Fiscal Year 1994 ("the Act"), codified at 10 U.S.C. § 654 (Supp.1994). The Act was signed by President Clinton on November 30, 1993. On December 21, 1993, the Department of Defense ("DOD") promulgated regulations implementing the new policy. These regulations were later modified and became effective on February 28, 1994. See DOD Directive 1332.14 (1994) (Enlisted Administrative Separations); DOD Directive

1332.30 (1994) (Separation of Regular Commissioned Officers); DOD Directive 1304.26 (1994) (Qualification Standards for Enlistment, Appointment and Induction). The Act and the companion DOD Directives are colloquially referred to as the "Don't Ask, Don't Tell" policy.

FN1. K. Williams, Gays in the Military: The Legal Issues, 28 U.S.F.L.Rev. 919, 920-21 (1994) (discussing history of the military's ban on homosexual service members).

The Act contains six subsections, with the main "policy" provisions set forth in subsection (b). Subsection (b) reads as follows:

> (b) Policy.--A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:
>
> > (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that--
> >
> > > (A) such conduct is a departure from the member's usual and customary behavior;
> > >
> > > (B) such conduct, under all the circumstances, is unlikely to recur;
> > >
> > > (C) such conduct was not accomplished by use of force, coercion, or intimidation;
> > >
> > > (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
> > >
> > > (E) the member does not have a propensity or intent to engage in homosexual acts.
> >
> > (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex. 10 U.S.C. § 654(b) (Supp.1994) (emphasis added).

[FN2] The primary justification for these measures is that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standard of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 654(a)(15) (Supp.1994).

FN2. A "[h]omosexual act" is defined as "[a]ny bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires, and ... [a]ny bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described ... above." See DOD Directive 1332.30 at 1-1 (emphasis added); 10 U.S.C. § 654(f)(3)(A) & (B) (Supp.1994).

The DOD's implementing Directives 1332.14 and 1332.30 are comparable to the Act. [FN3] These regulations provide, in relevant part, as follows:

FN3. DOD Directive 1332.14, which applies to enlisted personnel, is substantially similar to DOD Directive 1332.30, which applies to officers. Since Lt. Holmes was an officer at the time of his discharge, the Court's discussion will focus on DOD Directive 1332.30.

Homosexual conduct is grounds for separation from the Military Services.... Homosexual conduct includes homosexual acts, [or] a statement by a member that demonstrates a propensity or intent to engage in homosexual acts .... A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. A member's sexual orientation is considered a personal and private matter, and it is not a bar to continued service under this section unless manifested by homosexual conduct in the manner described in section C.1. See DOD Directive 1332.30 at 2-1 (emphasis added); DOD Directive 1332.14 at 1-9.

Under the new policy, the military no longer actively initiates investigations of service members to determine whether they are homosexual, DOD Directive 1332.30 at 8-1, and prospective new recruits are no longer questioned about their sexual orientation, DOD Directive 1304.26 at 1-5. However, a service member may not voluntarily acknowledge that he or she is gay without significant consequences. If a service member states that he or she is homosexual, that statement alone creates a "rebuttable presumption that

the [s]ervice member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." DOD Directive 1332.14 at 1-10; Id. 1332.30 at 2-2 (same language applied to officers). The service member will be discharged unless he or she can prove by a preponderance of the evidence that "he or she does not engage in, have a propensity to engage in or intend to engage in homosexual acts." DOD Directive 1332.14 at 1-10, 4-3; Id. 1332.30 at 2-2, 2-3.

II. Facts and Proceedings

A. Lt. Holmes' Role in the CANG and USANG

The material facts of this case are not in dispute. Lt. Holmes was an officer in the CANG and the USANG. He enrolled in the CANG in 1986. (Holmes Decl. ¶ 2.) In March 1989, he was sworn in as an officer of the CANG, and thereafter, as an officer in the USANG. (Id.) During his tenure with the CANG, Lt. Holmes was promoted to First Lieutenant and received the Army Achievement Medal, the Army Reserve Components Achievement Medal and the National Defense Service Ribbon while deployed to Germany in support of Operation Desert Shield and Operation Desert Storm. (Id. ¶ 3, 4.) His performance ratings have been uniformly exemplary, and his unit has been characterized as a "shining example of cohesion." (Id. ¶ 4.)

On June 3, 1993, Lt. Holmes sent a memorandum to his CANG commanding officer which stated that, "[A]s a matter of conscience, honesty and pride, I am compelled to inform you that I am gay." On that basis, Lt. Holmes' commanding officer initiated a request that Lt. Holmes' federal recognition as an officer be withdrawn. (Id. ¶¶ 5-6.)

On May 21, 1994, discharge proceedings were commenced against Lt. Holmes. The Federal Recognition Board ("the Board") considered his case under the new policy purporting to exclude gays from the military based on their conduct. (See Administrative Record.) The Board found that Lt. Holmes' admission that he is gay created a rebuttable presumption that he had engaged in or was likely to engage in homosexual acts, and that Lt. Holmes had failed to rebut that presumption. Despite Lt. Holmes' outstanding record of service, the Board recommended the withdrawal of his federal recognition. Based solely upon the loss of federal recognition, the CANG discharged Lt. Holmes.

B. The Instant Litigation

On February 28, 1995, Lt. Holmes commenced the instant action against the Federal and California defendants. Lt. Holmes filed a First Amended Complaint on April 17, 1995 which alleges thirteen claims for relief based on

federal and state law. The first seven claims are directed solely against the California defendants, and allege violations of: (1) his right to equal protection under the California Constitution; (2) his right to freedom of speech under the California Constitution; (3) his right to privacy under the California Constitution; (4) California Labor Code §§ 1101, 1102, and 1102.1; (5) California Government Code § 18500(c)(5); (6) Executive Order B-54-79; and (7) the Equal Protection Clause of the 14th Amendment to the United States Constitution.

The remaining six claims of the First Amended Complaint are premised on the United States Constitution and are alleged against all defendants. These claims are based on the doctrines of equal protection, free speech and free expression, vagueness and overbreadth, intimate associations, substantive due process, and privacy. [FN4] Lt. Holmes seeks, inter alia, a declaration that the Act and Directives are unconstitutional as applied to him under both the United States and California Constitutions, a preliminary and permanent injunction enjoining the defendants from enforcing the Act and Directives, immediate reinstatement of plaintiff's officer status with the USANG and reinstatement to the CANG.

FN4. Lt. Holmes has dismissed his claim for procedural due process and his damages prayer for back pay. (See Pl.'s Opp'n at 2 n. 2.)

C. Substantive Motions Before the Court

The parties have filed various motions to resolve the claims alleged by Lt. Holmes in his First Amended Complaint. Specifically, the California defendants move for dismissal of plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). [FN5] In their memorandum, the California defendants appear to advance the following arguments in support of their motion to dismiss: (1) plaintiff's claims are moot; (2) the California defendants are not legally responsible for Holmes' discharge because their actions are mandated by federal law; (3) plaintiff's claims are barred by the doctrine of sovereign immunity as set forth in the Eleventh Amendment; and (4) each of plaintiff's state law causes of action fails to state a claim upon which relief may be granted.

FN5. In addition to Rule 12(b)(6), the California defendants' cite Rule 12(e) as a basis for dismissing plaintiff's complaint. However, Rule 12(e) pertains to a motion for a more definite statement, not a motion to dismiss.

The Federal defendants have separately filed a Motion to Dismiss, or in the Alternative, for Summary Judgment, which addresses the substantive

merits of each of plaintiff's federal claims. In response, plaintiff has filed a Cross- Motion for Summary Adjudication as to Federal Defendants and Motion for Summary Adjudication as to California Defendants. Plaintiff's motion addresses his federal claims only.

In light of the myriad issues presented, the Court will first discuss whether Lt. Holmes has alleged viable state law claims against the California defendants. The Court will then address Lt. Holmes' federal claims to determine whether they are subject to dismissal, or whether they should be summarily adjudicated in favor of plaintiff. That discussion will commence with an analysis of the defenses raised by the California defendants, followed by a substantive discussion of each of the federal claims as they relate to all defendants.

Before turning to the substantive merits of plaintiff's claims, however, the Court must assess plaintiff's request to strike the California defendants' untimely opposition to plaintiff's cross-motion for summary adjudication.

D. Plaintiff's Motion to Strike

On June 23, 1995, the Court entered a scheduling order pursuant to the stipulated request of the parties. [FN6] This stipulated order provided that plaintiff was required to file his opposition to the defendants' motions along with a cross-motion for summary judgment on his federal claims by June 20, 1995. The order further provided that the defendants were required to file their replies in support of their respective motions and their oppositions to plaintiff's cross-motion by no later than July 3, 1995. Plaintiff was required to file his replies to the defendants' oppositions by no later than July 11, 1995.

FN6. The stipulation was signed by Jay Kuo on behalf of the plaintiff, Mark Quinlavin on behalf of the Federal defendants, and Andrew Loomis on behalf of the California defendants.

[1] Plaintiff timely filed a combined opposition to the Federal defendants' motion and cross-motion for summary adjudication of his federal claims. However, the California defendants did not file their opposition to plaintiff's cross-motion until July 10, 1995, a full week after their brief was due, nor did they seek leave of the Court before doing so. Consequently, Lt. Holmes now moves to strike the California defendants' opposition to his cross- motion for summary adjudication of his federal claims on the ground that it was filed outside the stipulated scheduling order issued by the Court and is therefore untimely.

[2] The district court has the discretion to strike untimely papers where the late-filing party fails to demonstrate excusable neglect. Wood v. Santa

Barbara Chamber of Commerce, 705 F.2d 1515, 1519 (9th Cir.1983), cert. denied, 465 U.S. 1081, 104 S.Ct. 1446, 79 L.Ed.2d 765 (1984) (district court did not abuse its discretion in striking untimely affidavits in opposition to summary judgment motion where party failed to request extension of time or show excusable neglect); accord Mendez v. Banco Popular de Puerto Rico, 900 F.2d 4, 7-8 (1st Cir.1990) ("the district court was not obliged to consider appellant's untimely opposition in applying the Rule 56 standard.") (citing Wood, 705 F.2d at 1519). Here, the California defendants argue that while the stipulated scheduling order provided for the filing of a "motion for summary judgment", it did not contemplate a "motion for summary adjudication." As such, the California defendants argue that their opposition to plaintiff's motion was not governed by the stipulated scheduling order, and that their opposition was timely under the Local Rules then in effect.

[3] The rationalization proffered by the California defendants strains credulity. The stipulated scheduling order clearly stated that plaintiff intended to file a summary judgment motion on his federal claims--which is precisely what plaintiff filed. The fact that the motion was styled as a motion for "summary adjudication" as opposed to a motion for "summary judgment" is a distinction without a difference. Both motions are cognizable under Federal Rule of Civil Procedure 56 and are governed by the same standard of review. See United States v. 1982 Sanger 24' Spectra Boat, 738 F.2d 1043,

1046 (9th Cir.1984) (finding that the substance of a motion, as opposed to how it is styled, determines how the motion should be construed). [FN7] Thus, the Court finds the California defendants' proffered explanation for their failure to comply with the stipulated scheduling order issued by the Court to be unacceptable.

FN7. Notably, counsel for the Federal defendants experienced no difficulty discerning that the cross-motion filed by plaintiff was the same motion envisioned in the parties' discussions, (see Kuo Decl. in Supp. of Mot. to Strike ¶¶ 3-5), and in the stipulated scheduling order, as evidenced by his timely filed response.

The California defendants' inexplicable failure to comply with the stipulated scheduling order has unnecessarily resulted in additional expenditures of resources by counsel for the plaintiff. Indeed, the California defendants' justification for the late filing comes perilously close to violating Rule 11. Under the circumstances presented, the Court finds that the California defendants' papers filed in opposition to Lt. Holmes' cross-motion for summary adjudication of his federal claims should be stricken from the record.

In any event, the Court notes that consideration of the California defendants' untimely opposition brief would not have altered the outcome of this action. Their opposition brief largely repeats the arguments raised in their motion to dismiss. Moreover, like their other papers, the California defendants' opposition contains a plethora of improper invective and ad hominem attacks on the plaintiff, and was, for the most part, lacking in any cogent legal analysis. [FN8]

FN8. The California defendants' papers are replete with perjoratives and extraneous and derogatory commentary, ostensibly intended to deride plaintiff by virtue of his homosexuality. For example, in one part of his brief, California defendants' counsel, Mr. Andrew Loomis, analogizes homosexuality to "statutory rape, incest, sodomy, illicit drug use, possession of child pornography, pederasty, bestiality, cannibalism and molesting, etc." (Cal.Defs.' Mot. to Dismiss at 17 n. 13.) In the reply filed in support of his motion to dismiss, Mr. Loomis taunts, "Mr. Holmes, what are you?" (Cal.Defs.' Reply in Supp. of Mot. to Dismiss at 15 n. 20.) Finally, defense counsel concludes his "legal argument" by asserting, "In sum, Holmes is irked that the Constitution does not recognize anything special about his own favorite nasty habits." (Cal.Defs.' Mot. to Dismiss at 25.) These are but a few examples of the highly unseemly and unprofessional commentary which litters the California defendants' briefs.

DISCUSSION

I. Standards of Review

A. Summary Judgment

Under Federal Rule of Civil Procedure 56, summary judgment is warranted against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986).

[6][7][8] In opposing a summary judgment motion, the nonmoving party must come forward with specific facts demonstrating a genuine factual issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Thus, an opposition which fails to identify and reference triable facts is insufficient to preclude the Court's granting of a properly supported summary judgment motion. See

Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538, 1545 (9th Cir.1988). Nonetheless, any inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631 (9th Cir.1987).

B. Failure to State a Claim

Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss should not be granted unless it appears beyond a doubt that the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). For purposes of such a motion, the complaint is construed in a light most favorable to the plaintiff and all properly pleaded factual allegations are taken as true. Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct. 1843, 1848-49, 23 L.Ed.2d 404 (1969); Everest and Jennings, Inc. v. American Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir.1994).

II. State Law Claims

Plaintiff has advanced six claims for relief against the California defendants which are premised solely on state law. In their motion to dismiss, the California defendants contend that these claims are barred by the doctrine of sovereign immunity. The Court agrees. Under the Eleventh Amendment, federal courts are barred from deciding state law claims against a state or its officials. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 106, 104 S.Ct. 900, 911, 79 L.Ed.2d 67 (1984); accord Han v. U.S. Dept. of Justice, 45 F.3d 333, 338 (9th Cir.1995). [FN9] Unless a state has waived its Eleventh Amendment immunity or Congress has overridden it, a state cannot be sued regardless of the relief sought. Kentucky v. Graham, 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 3106 n. 14, 87 L.Ed.2d 114 (1985) (citing Alabama v. Pugh, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978)).

FN9. State officials sued in their official capacity "are considered to be acting on behalf of the state, and the Eleventh Amendment therefore shields them from suit." Coeur d'Alene Indian Tribe of Idaho v. State of Idaho, 42 F.3d 1244, 1250 (9th Cir.1994) (citing cases).

Plaintiff mistakenly relies on an exception to the doctrine of sovereign immunity known as the Ex Parte Young exception, which provides that the Eleventh Amendment does not foreclose claims against a state where the plaintiff seeks only prospective injunctive relief. Ex parte Young, 209 U.S. 123, 155-56, 28 S.Ct. 441, 452, 52 L.Ed. 714 (1908); Committee to Save Mokelumne River v. East Bay Municipal Utility Dist., 13 F.3d 305, 309 (9th

Cir.1993), cert. denied, 513 U.S. 873, 115 S.Ct. 198, 130 L.Ed.2d 130 (1994). While the Ex parte Young exception may save plaintiff's federal claims, (see discussion infra at 1525), it has no application to plaintiff's state law claims. See Ulaleo v. Paty, 902 F.2d 1395, 1400 (9th Cir.1990). The Court therefore grants the California defendants' motion to dismiss as it relates to plaintiff's state law causes of action, which are set forth in the First Amended Complaint as plaintiff's first through sixth claims for relief. These claims are dismissed without prejudice to plaintiff bringing said claims in the appropriate state forum.

III. Federal Claims

Both the California and Federal defendants' respective motions seek dismissal of plaintiff's federal claims, while plaintiff's cross-motion seeks summary adjudication of those claims in his favor. The Court will address the merits of plaintiff's federal claims by first analyzing the arguments germane only to the California defendants. Following that discussion, the Court will discuss the merits of each of plaintiff's individual federal claims.

A. Defenses Raised By the California Defendants

1. Overview of the National Guard

To place the California defendants' arguments in context, the Court will briefly review the structure of the CANG and its relationship to the USANG.

[15] The National Guard is the modern-day equivalent of the "militia." Maryland v. United States, 381 U.S. 41, 46, 85 S.Ct. 1293, 1297, 14 L.Ed.2d 205, vacated on other grounds, 382 U.S. 159, 86 S.Ct. 305, 15 L.Ed.2d 227 (1965). The Constitution authorizes Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. Const., art. I, § 8, cl. 15. The Constitution also gives Congress the power to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. Const., art. I, § 8, cl. 16. These clauses are commonly described as the "Militia Clauses." Perpich v. Department of Defense, 496 U.S. 334, 337 n. 3, 110 S.Ct. 2418, 2421 n. 3, 110 L.Ed.2d 312 (1990).

From 1903 to 1933, Congress passed a series of acts and amendments which completely overhauled the state militia system. See id. at 341-45, 110 S.Ct. at 2423-25. Those acts established the National Guard system, which consists of " 'two overlapping but distinct organizations' ... the National Guard

of the various States and the National Guard of the United States." Id. at 345, 110 S.Ct. at 2425. "Since 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States." Id. Thus, National Guardsmen "now must keep three hats in their closets--a civilian hat, a state militia hat, and an army hat-- only one of which is worn at any particular time." Id. at 348, 110 S.Ct. at 2427.

Officers are first commissioned in a state National Guard. "[S]election and appointment of [state] Army National Guard officers is solely a state responsibility." MacFarlane v. Grasso, 696 F.2d 217, 226 n. 4 (2d Cir.1982) (emphasis added). "Upon appointment in the Army National Guard of a State ... an individual has a State status under which he can function." Id. An officer commissioned as an officer into the state national guard may become an officer in the USANG upon a grant of federal recognition. 32 U.S.C. § 307(d); Dehne v. United States, 970 F.2d 890, 891 (Fed.Cir.1992). "Federal recognition is the acknowledgment by the Federal Government that an officer [of the state militia] appointed, promoted, or transferred to an authorized grade or position vacancy in the Army National Guard [of the United States] meets the prescribed laws and regulation[s] governing the [appointment, promotion, or transfer]." Frey v. State of Cal., 982 F.2d 399, 400 n. 3 (9th Cir.), cert. denied, 509 U.S. 906, 113 S.Ct. 3000, 125 L.Ed.2d 693 (1993).[19][20] State National Guards receive federal funding by maintaining federally-recognized units; "[s]tates that fail to comply with federal regulations risk forfeiture of federal funds allocated to organize, equip and arm state Guards." Charles v. Rice, 28 F.3d 1312, 1315-316 (1st Cir.1994) (citing 32 U.S.C. §§ 101, 107, 108, 501 and Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d 765, 767 (7th Cir.1993), cert. denied, 510 U.S. 933, 114 S.Ct. 347, 126 L.Ed.2d 311 (1993)). Therefore, most, if not all, states primarily commission those individuals who meet federal qualifications. MacFarlane, 696 F.2d at 226 n. 4; see Cal.Mil. & Vet.Code § 222 ("Persons to be commissioned in the National Guard shall be selected from those eligible for federal recognition...."). The USANG is composed of all the federally-recognized members of the state Army National Guards. 32 U.S.C. § 101(4)(D). When not in the active service of the United States, such units are predominantly state entities and are under the command of the governor. MacFarlane, 696 F.2d at 226 n. 4. Once a state officer receives a federal commission, his "capacity and general fitness" to retain his federal recognition can be investigated at any time by an efficiency board composed of commissioned officers of the Regular Military, USANG or both. 32 U.S.C. § 323(b). The findings and recommendations of such boards are reviewed by the Chief of the National Guard Bureau ("NGB"), a joint bureau of the Department of the Army and the Department of the Air Force. If the NGB agrees with a

negative report from the efficiency board, the officer loses his federal recognition.

2. Plaintiff's Claims Are Not Moot

Article III of the Constitution limits federal judicial power to "Cases" and "Controversies." United States Parole Comm'n v. Geraghty, 445 U.S. 388, 395, 100 S.Ct. 1202, 1208, 63 L.Ed.2d 479 (1980). Under this limitation, "a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Murphy v. Hunt, 455 U.S. 478, 481, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982) (citing Geraghty, 445 U.S. at 396, 100 S.Ct. at 1208-09); accord Western Oil and Gas Ass'n v. Sonoma County, 905 F.2d 1287, 1290 (9th Cir.1990), cert. denied, 498 U.S. 1067, 111 S.Ct. 784, 112 L.Ed.2d 846 (1991). When a matter becomes moot, the Court no longer has jurisdiction over the action. County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979).

In the instant case, the California defendants maintain that this action should be dismissed as moot because plaintiff has admitted that he has engaged in homosexual acts, and hence, cannot regain his federal recognition. (Cal.Defs.' Mot. to Dismiss at 4-5.) This contention lacks merit. The California defendants cite no authority, evidentiary or otherwise, to support this assertion. In fact, the only "act" which plaintiff has engaged in is acknowledging that he is gay. [FN10] Since plaintiff is challenging the constitutionality of the military's policy which effectively equates an acknowledgment of status with proscribed conduct, the issues before the Court are "live" for jurisdictional purposes. The Court therefore rejects the California defendants' mootness argument.

FN10. The California defendants also make much of plaintiff's admission that he would otherwise engage in homosexual conduct but for the policies in place. Far from demonstrating that plaintiff intends to engage in proscribed conduct, this statement indicates that plaintiff intends to conform his conduct to the military's regulations. The fact that plaintiff might act differently if such actions were permitted is irrelevant.

3. The California Defendants' Preemption Defense Lacks Merit

The California defendants next contend that they cannot be held liable for Holmes' discharge because they were bound by the Federal defendants' decision to withdraw Holmes' federal recognition, and that their discharge of plaintiff was simply a "ministerial" act. (See Cal.Defs.' Mot. to Dismiss at 2, 5-8.) In support of this contention, the California defendants' rely primarily on

32 U.S.C. § 324(a), which they assert directly compels the states to discharge National Guard officers who lose their federal recognition. They also cite 10 U.S.C. § 654(b) as necessarily preempting state regulation of the National Guard members--even when the Guard is in state service.

a. 32 U.S.C. § 324(a)(2) Section 324(a) provides that "[a]n officer of the National Guard shall be discharged when ... his Federal recognition is withdrawn." 32 U.S.C. § 324(a)(2). It is not readily apparent to which National Guard (in this case, CANG or USANG) the statute refers. Nevertheless, the California defendants assert that "loss of federal recognition means automatic discharge from the California National Guard." (Cal.Defs.' Mot. to Dismiss at 6.) At first blush, the definitions applicable to Title 32 arguably support the California defendants' interpretation. The United States Code defines " 'National Guard' [to mean] the Army National Guard and the Air National Guard." 32 U.S.C. § 101(3). " 'Army National Guard' means that part of the organized militia of the several States...." 32 U.S.C. § 101(4) (emphasis added). The Army National Guard is distinguished from the "Army National Guard of the United States." 32 U.S.C. § 101(5). Thus, the California defendants correctly state that section 324(a) can be read to regulate the discharge of officers from state National Guards.

Notwithstanding the above, the Court disagrees with the California defendants that state compliance with section 324(a) is necessarily compelled by the Supremacy Clause. "The termination of the appointment of a commissioned officer of the National Guard is a function of the State authorities." 32 U.S.C. App. § 1101.5. Consistent with this authority, this Circuit in Frey explicitly recognized that the power of appointing or terminating a state National Guard officer is a matter left to the states. Frey, 982 F.2d at 402 (citing cases and statutes); see also U.S. v. Dern, 74 F.2d 485, 487 (D.C.Cir.1934) ("The United States has not appointed, and constitutionally cannot appoint or remove (except after being called into federal service), officers of the National Guard....") (emphasis added). Although the loss of federal recognition precludes the officer's membership in the National Guard of the United States, the officer may still be a member of the National Guard of the state. See MacFarlane, 696 F.2d at 226 n. 4.

Indeed, direct federal control over state militia personnel decisions, through the granting and withdrawing of "federal recognition," would completely eviscerate the appointment power reserved to the states in the Militia Clauses. Therefore, section 324(a) would be constitutionally infirm if, as the California defendants urge, it requires the discharge of a state-appointed officer in state service merely for losing federal recognition.

Section 324(a) does not purport to preempt state law. Rather, it regulates the states only indirectly, as part of a conditional spending program. "State control in administering matters such as training, personnel, logistics, doctrine, and military justice has been eliminated by a system of federal conditional spending." P.T. Mullins, The Militia Clauses, the National Guard, and Federalism: A Constitutional Tug of War, 57 Geo.Wash.L.Rev. 328, 343 (1988) (emphasis added).

The only effective control exercised by the federal government and the regular armed forces relative to organizing, equipping, training and policies of the National Guard of any of the States comes from the control of the funds which may be granted to or withheld from the National Guard units pursuant to granting or withdrawing federal recognition. Don't Ruin Our Park v. Stone, 749 F.Supp. 1386, 1388 (M.D.Pa.1990) (emphasis added); 32 U.S.C. § 108 (President may withhold federal funds if state fails to comply with any Title 32 provision); accord Charles, 28 F.3d at 1315; Mullins, supra, at 343 ("This purse string has been used to put the states in a 'catch-22' situation--retain autonomy and lose funding or accept funding and submit to federal control.").

Through the federal recognition system, Congress has effectively circumvented the Militia Clauses' limitation on federal control of militia personnel. Unable or unwilling to forego federal funding, states have voluntarily restrained the exercise of their appointment power by primarily commissioning individuals who are eligible for federal recognition. Thus, even though federal recognition ostensibly does not occur until after the state has appointed an officer, in practical effect, federal recognition determines who may receive a state commission. Similarly, states are effectively forced to discharge or transfer officers who lose their federal recognition in order to preserve federal recognition and funding of the officers' units. Nonetheless, at least with respect to personnel decisions, states ultimately choose to comply with federal National Guard policies.

[FN11] At the risk of losing funding, states are free to break from § 324(a) and to retain in state service officers who lose their federal recognition.

[FN12] See MacFarlane, 696 F.2d at 226 n. 4.

FN11. The Court expresses no opinion as to whether federal control over organization, training, and discipline also depends upon Congress' conditional spending program, or whether present National Guard policies in these areas flow from the powers granted to Congress in the Militia Clauses.

FN12. An alternative course of action is to transfer the officer to a position that does not require federal recognition, thus preserving federal recognition (and therefore, funding) of the officer's former unit.

This fact is illustrated by the experience of at least one National Guard officer who lost his federal recognition but continued to serve in the California military. In Frey, 982 F.2d 399, Colonel Archer Frey brought suit against the state under federal age discrimination laws after being discharged for reaching a state-imposed mandatory retirement age. Frey lost his federal recognition in 1985 because he had attained 30 years of commissioned service. However, "[f]rom 1985 until his mandatory retirement [in 1991], Frey served ... as a military officer in the California National Guard." Id. at 400.

The court noted, "As in Frey's case, one may be a member of the State National Guard, but not a member of the Army or Air National Guard of the United States." Id. at 400 n. 2. The court described the effects of loss of federal recognition:

The loss of federal recognition means that the officer no longer participates in federally-paid duty status, which includes activities such as drills, annual training, or service schools at any cost to the federal government, nor may he be called into active federal service.

Id. at 400 n. 3. Significantly absent from this list of consequences is "automatic discharge." Such a consequence would in fact render the enumerated consequences irrelevant.

Frey directly contradicts the California defendants' assertion that they must invariably follow and mechanically apply § 324(a). Colonel Frey's experience demonstrates that loss of federal recognition is not an absolute bar to service in California's National Guard. See 11 Ops.Cal. Att'y Gen. 253, 261 (1948) ("Withdrawal of federal recognition does not deprive the officer of his state commission."). Indeed, California law authorizes the commissioning of certain previously-discharged officers who "are no longer eligible for federal recognition." Cal.Mil. & Vet.Code § 222. In contrast, no California statute expressly requires the discharge of an officer who loses federal recognition.

The California defendants fail to appreciate the role of conditional spending in Congress' regulation of the state Guards, and their interpretation of § 324(a) burdens the statute with a serious constitutional infirmity. Furthermore, the California defendants' position is contradicted by a recent example of noncompliance with § 324(a). Therefore, the Court rejects the California defendants' argument that section 324(a) left them with no choice but to discharge Holmes.

b. 10 U.S.C. § 654(b)

The California defendants also contend that they had no control over Holmes' discharge because the federal government's anti-homosexual policy (10 U.S.C. § 654(b)) controls "[i]n both the state and federal 'halves' of the National Guard...." (Cal.Defs.' Reply at 16.) For this proposition, they apparently rely on Johnson v. Orr, 617 F.Supp. 170 (E.D.Cal.1985), aff'd, 787 F.2d 597 (9th Cir.1986). In Johnson, a lesbian member of the California National Guard was discharged, pursuant to the federal military regulations that preceded the present policy, after informing her commander of her sexual orientation. The district court, without citing any authority other than the text of the Militia Clauses, ruled that federal regulations applied to National Guard officers even in their state capacity by virtue of Congress' power to "discipline" the militia. Johnson, 617 F.Supp. at 177 (emphasis added). The Ninth Circuit affirmed in an unpublished decision. See 787

F.2d 597 (9th Cir.1986).

More recent Supreme Court and Ninth Circuit cases, however, suggest that Johnson is no longer reliable authority. In Gilliam v. Miller, 973 F.2d 760 (9th Cir.1992), two plaintiffs brought suit after being discharged from the Oregon Army National Guard ("ORARNG") for failing to comply with federal military weight control regulations. [FN13] Attempting to state a claim under the federal Administrative Procedure Act, the plaintiffs argued that the Oregon Adjutant General acted as a federal agent when he applied the regulations and removed them from the ORARNG. A magistrate judge recommended, and the district court initially approved, a finding favorable to the plaintiffs.

FN13. Like California, Oregon has adopted by statute all applicable federal military regulations.

The Adjutant General moved for reconsideration after the Supreme Court, in its Perpich decision, provided a new analysis of the National Guard system. The district court granted the motion and found, pursuant to the conceptual framework articulated in Perpich, that the Adjutant General had been wearing his "state militia hat" when he discharged the plaintiffs. The court reversed its initial finding and dismissed the complaints for failure to state a claim.

The Ninth Circuit affirmed. Rejecting the argument that federal, not state, law controlled, the court held that the regulations were applicable to the plaintiffs not because they preempted state law, but because the state voluntarily incorporated them into state law. Id. at 761 n. 2 and 763. Thus, "the adoption of federal training requirements for members of ORARNG by

the Oregon Legislature was not a sham," as it would have been if those requirements had already preempted state law. Id. at 763. When the Adjutant General discharged the plaintiffs from state service, he did so "solely in the capacity of a state actor," "fulfilling his role under state law," and not "under federal control." Id. at 764; see Zitser v. Walsh, 352 F.Supp. 438, 440 (D.C.Conn.1972) (where Connecticut Army National Guard colonel used a federally-promulgated regulation to determine officer's qualifications, "state law commanded him to apply that regulation").

Gilliam cannot be reconciled with the Ninth Circuit's decision in Johnson. Those cases squarely reach opposite conclusions on the question of whether regulation of the National Guard when not in federal service is a state or federal function. In addition to being a more recent case, Gilliam more likely expresses the Ninth Circuit's present position because it followed, and expressly relied on, the Supreme Court's analysis of the National Guard system in Perpich. See id. at 763-64. Therefore, this Court finds that Gilliam controls and that Perpich and Gilliam together have implicitly overruled Johnson.

In light of Gilliam, the California defendants cannot maintain that they acted only "ministerially" in following 10 U.S.C. § 654(b); rather, they acted under color of state law. The California defendants were required to enforce the policy only because, and indeed if, California has adopted that policy. The Court therefore rejects the California defendants' claim that § 654(b) preempted their authority over Holmes' service.

4. Plaintiff's Federal Claims Are Not Barred By the Doctrine of Sovereign Immunity

Finally, the California defendants argue that the doctrine of sovereign immunity under the Eleventh Amendment bars plaintiff's federal claims for relief alleged against them. The Court rejects this argument. Under the Ex parte Young exception, a suit against a state official seeking relief from unconstitutional state action is not a suit against the state, even if the state is the real party in interest. Ex parte Young, 209 U.S. at 160, 28 S.Ct. at 454; Kentucky, 473 U.S. at 167 n. 14, 105 S.Ct. at 3106 n. 14. "The Ex Parte Young exception is necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." Almond Hill School v. U.S. Dept. of Agriculture, 768 F.2d 1030, 1034 (9th Cir.1985) (internal quotation marks and citations omitted). Since plaintiff is seeking prospective injunctive relief preventing the California defendants from violating his rights under the United States Constitution, plaintiff may proceed on his federal claims against the California defendants.

Demery v. Kupperman, 735 F.2d 1139, 1146 (9th Cir.1984), cert. denied sub. nom, 469 U.S. 1127, 105 S.Ct. 810, 83 L.Ed.2d 803 (1985).

B. Equal Protection

In his Sixth and Seventh Claims for Relief, Lt. Holmes alleges that the disparate treatment of homosexual and heterosexual service members under the Act and Directives constitutes a violation of his right to equal protection under the United States Constitution. As will be set forth below, the Court finds merit to this claim and concludes that the Act and Directives: (1) impermissibly discriminate against homosexual service members on the basis of sexual orientation as opposed to homosexual conduct; (2) fail to rationally further a legitimate governmental interest; and (3) are irrational as a matter of law because they are founded on and give effect to the prejudices and biases of others. These issues will be discussed seriatim.

1. The Rational Basis Test

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. am. XIV § 1. This is essentially "a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985) (quoting Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394-95, 72 L.Ed.2d 786 (1982)); Jackson Water Works v. Public Utils. Comm'n, 793 F.2d 1090, 1092 (9th Cir.1986), cert. denied, 479 U.S. 1102, 107 S.Ct. 1334, 94 L.Ed.2d 184 (1987). Although the Fourteenth Amendment expressly applies only to the states, the protections afforded thereunder apply equally to federal legislation, albeit through the Due Process Clause of the Fifth Amendment. Cecelia Packing Corp. v. U.S. Dept. of Agriculture, 10 F.3d 616, 623-24 (9th Cir.1993).

[32] There are three levels of judicial review applicable to equal protection challenges: strict scrutiny, heightened scrutiny, and rational basis review. High Tech Gays v. Defense Indus. Security Clearance Office, 895 F.2d 563, 571 (9th Cir.), reh'g denied, 909 F.2d 375 (9th Cir.1990). This Circuit has previously held that gays are not a suspect class, and therefore, classifications affecting homosexuals as a class are subject only to rational basis review. Id. [FN14]

FN14. Plaintiff invites this Court to revisit the issue of whether homosexuals are a suspect class, based on new evidence that sexual orientation is genetic and an immutable characteristic. (See Pl.'s Opp'n and Cross-Mot. at 8 n. 9.)

However, as the Court finds that the military's current policy lacks any rational basis, the Court finds it unnecessary to reach this issue.

Under a rational basis framework, the relevant inquiry with respect to an equal protection challenge is whether the challenged action "rationally furthers a legitimate state purpose or interest." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 55, 93 S.Ct. 1278, 1308, 36 L.Ed.2d 16 (1973); United States v. Harding, 971 F.2d 410, 412 (9th Cir.1992), cert. denied, 506 U.S. 1070, 113 S.Ct. 1025, 122 L.Ed.2d 170 (1993). "[I]f there is a rational relationship between the disparity of treatment and some legitimate governmental purpose," the discriminatory classification is presumed valid and must be sustained. Heller v. Doe, 509 U.S. 312, 318-19, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993). Notwithstanding the strong presumption of validity, "the standard of rationality ... must find some footing in the realities of the subject addressed by the legislation." Id. at 321, 113 S.Ct. at 2643.

The Court recognizes that in undertaking its analysis of plaintiff's equal protection claim, the judiciary must give deference to the military's judgment; the "military decisions by the Army are not lightly overruled by the judiciary." Pruitt v. Cheney, 963 F.2d 1160, 1166 (9th Cir.1991), cert. denied, 506 U.S. 1020, 113 S.Ct. 655, 121 L.Ed.2d 581 (1992); Rostker v. Goldberg, 453 U.S. 57, 65, 101 S.Ct. 2646, 2651-52, 69 L.Ed.2d 478 (1981) ("it is difficult to conceive of an area of governmental activity in which the courts have less competence.") (quoting Gilligan v. Morgan, 413 U.S. 1, 10, 93 S.Ct. 2440, 2445-46, 37 L.Ed.2d 407 (1973)). However, while military decisions are entitled to substantial deference, such deference should not be construed "to say that Congress is free to disregard the Constitution when it acts in the area of military affairs." Rostker, 453 U.S. at 67, 101 S.Ct. at 2653. The military is not the final arbiter of the constitutionality of its policies, and it must operate within the parameters established by statute and the Constitution. Id.; Goldman v. Weinberger, 475 U.S. 503, 523, 106 S.Ct. 1310, 1321, 89 L.Ed.2d 478 (1986) (Brennan, J., dissenting) ("It is not the province of the federal courts to second-guess the professional judgments of the military services, but we are bound by the Constitution to assure ourselves that there exists a rational foundation for assertions of military necessity.").

2. The Policy Unconstitutionally Discriminates on the Basis of Status

a. Conduct is Equated With Status [40] The threshold issue presented with respect to plaintiff's equal protection claim is whether the policy excludes service members only on the basis of homosexual conduct, or whether it discriminates against homosexuals based on their status (i.e., sexual orientation). In the context of military service, the Ninth Circuit has

recognized that it is "constitutionally permissible" to exclude service members based on "homosexual conduct." Meinhold v. U.S. Dept. of Defense, 34 F.3d 1469, 1477 (9th Cir.1994). This Circuit, however, has also held that a discharge based on the service member's "status as a homosexual" states an equal protection claim. Pruitt, 963 F.2d at 1164 (emphasis added); Meinhold, 34 F.3d at 1477.

The Federal defendants assert that the new policy addresses homosexual conduct, not homosexual status or orientation. [FN15] Yet, the actual language of the policy belies this assertion. The Directives define "sexual orientation " as "[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts." DOD Directive 1332.30 at 1-2 (emphasis added). "Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts." Id. at 1-1 (emphasis added).

FN15. The Department of Defense is cognizant of the constitutional flaws inherent in a status-based policy. During the Senate hearings, Jamie Gorelick, then counsel to the Department of Defense, stated during a Senate Committee hearing on the new policy that, "The reason we do not discharge people because we believe them to have a homosexual orientation is because in 1981 it was recognized that if we did have a status-based as opposed to conduct-based rule, that it would be vulnerable to the Courts." S.Hrg. 103-845 at 777. However, the policy further provides that a service member's or officer's statement "that he or she is a homosexual" by itself "demonstrates a propensity or intent to engage in homosexual acts, ..." Id. at 2-1, 2-2. In other words, acknowledging one's homosexual orientation is equated with a "propensity" to engage in homosexual acts, which, in turn, is deemed sufficient to warrant expulsion from the military. The policy thus collapses that which it purports to treat as distinct. Certainly, if "orientation" or "status" and "propensity" are genuinely distinct concepts under the new policy, the former would not be used to define the latter. "Neither the Act nor the Directives explain how to differentiate an 'orientation' from a 'propensity,' although the Act's avowed policy to insure that 'homosexual orientation' not be treated as a 'bar' to service would seem to make such differentiation crucial." Able v. United States, 880 F.Supp. 968, 975 (E.D.N.Y.1995) (emphasis added). Tellingly, the military apparently recognizes the questionable nature of the distinction the policy attempts to create between status and conduct. During the Senate Committee hearings, the military conceded that the possibility that a service member can "have the orientation without the propensity" is only a "hypothetical" one. S.Hrg. 103-845 at 800. The military

further recognized that a mere declaration of sexual orientation, such as "I am gay," is tantamount to homosexual conduct, even though there is no evidence of such conduct:

Senator COHEN: Okay. So let me come back to the final point. We have a situation, then, where a mere declaration that one is a homosexual, that is "conduct," under your interpretation of the rule that is going to be adopted.

Ms. GORELICK: That is correct. That is consistent with the prior policy, Senator.

Senator COHEN: And even though there is no evidence of conduct, per se--

Ms. GORELICK: That is correct.

S.Hrg. 103-845 at 819 (emphasis added).

The DOD's admissions, coupled with the circuitous definitions contained in the Directives, clearly reveal that the policy is designed to--and effectively permits--the military to exclude homosexuals from military service based solely on their status or orientation. The professed focus on proscribed conduct is little more than a thinly veiled attempt to camouflage this deception under a veneer of apparent constitutionality. Any purported distinction between status and conduct under the policy is purely illusory. As such, the Act and Directives discriminate on the basis of homosexual status, and therefore, fail to comport with the notions of equal protection under the Constitution. Pruitt, 963 F.2d at 1164.

b. The Rebuttable Presumption Does Not Address the Court's Constitutional Concerns

Defendants counter that the new policy does, in fact, treat status and conduct as separate and distinct concepts. As support for this proposition, defendants point to 10 U.S.C. § 654(b)(2), which ostensibly provides service members with the opportunity to rebut the presumption (which arises from a statement of homosexual orientation) that they intend or have a propensity to engage in homosexual conduct. Unfortunately, this "opportunity" fails to avoid the constitutional concerns of merging status with conduct because (1) service members have no meaningful opportunity to rebut the presumption, and (2) the existence and application of the presumption are constitutionally unsound.

i. The Presumption is Effectively Irrebuttable

The policy does not provide a concrete method much less a realistic opportunity for a service member to prove that he or she does not engage in, have a propensity to engage in, or intend to engage in homosexual conduct.

Able, 880 F.Supp. at 975 ("Neither the Act nor the Directives suggest how one who is born with an innate tendency, an 'orientation' or a 'propensity,' to commit a homosexual act can prove that he or she does not have such an orientation or propensity.") Moreover, in drafting the policy, the DOD specifically intended to foreclose a self-identified homosexual service member from rebutting the presumption by "a promise to adhere to military standards of conduct in the future." S.Hrg. 103-112 at 294. Nor can the member rebut the presumption by "a statement to the effect that he or she has a propensity towards homosexuality but has not acted on it." Id.

The DOD further acknowledged that the "opportunity" to rebut the presumption is only "hypothetically" possible in cases where the service member recants his statement by stating that "I was misunderstood, I did not mean it, it was a joke." S.Hrg. 103-845 at 772. [FN16] In other words, rebutting the presumption is hypothetically possible if the military is convinced that the service member really is not gay. See Thorne v. United States Dept. of Defense, 916 F.Supp. 1358, 1363-64 (E.D.Va.1996) ("Closely read, the statute is a tautology and hence the rebuttable presumption it purports to express is illusory, for it cannot be rebutted short of the declarant recanting the original statement declaring his or her homosexuality.").

FN16. Ms. Gorelick was also quick to emphasize:

The burden is placed on the service member throughout. And I would reiterate what the Secretary said yesterday, which is that is a very high burden and no one has ever done it.

S.Hrg. 103-845 at 772.

The Court also finds uncompelling the seven cases cited by the Federal defendants which they assert demonstrate that service members have successfully rebutted the presumption. (See Fed.Defs.' Reply at 9-10; Naccarato Decl. ¶ 2; Suppl. Galligan Decl. ¶ 3.) [FN17] Both the Naccarato and Galligan declarations submitted in support of the Federal defendants' motion are conspicuously silent as to the facts and circumstances of any of those cases, and more importantly, the manner in which these individuals allegedly rebutted the presumption that they engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts. Without this information, the mere contention that a handful of service members have successfully rebutted the presumption is of little, if any, probative value. [FN18]

FN17. Colonel Timothy E. Naccarato is an officer in the United States Army and, at the time his declaration was prepared, was the Chief of the United

States Army Litigation Division. (Naccarato Decl. ¶ 1.) Colonel John P. Galligan is Colonel Naccarato's successor. (Suppl. Galligan Decl. ¶ 1.)

FN18. The Able court explained that the incidents touted by the Federal defendants were "aberrations." The court explained:

In one, the member had said "she thought she might be gay." In another, the member had stated "I'm kind of confused about my sexual preference." And in the third the member had said he was homosexual in what he thought was a confidential session with a Navy counselor who tried to make him "comfortable" and as "free as possible" so as to get to the "root" of the member's problems....

* * * * * *

These three atypical results are obviously aberrations that cannot be taken to show that the Act holds out any realistic opportunity to rebut the presumption.

Able, 880 F.Supp. at 976.

ii. The Rebuttable Presumption Violates Equal Protection

In any event, even if the Court were convinced that gay service members were afforded a meaningful opportunity to rebut the presumption, the Court finds that the presumption is irrational. Preliminarily, the policy assumes that all service members who acknowledge their homosexuality will act in accordance with their orientation in the future and engage in proscribed conduct. This is constitutionally unacceptable. The Supreme Court has consistently found that conduct cannot be presumed to follow from a person's status. Jacobson v. United States, 503 U.S. 540, 551-552, 112 S.Ct. 1535, 1541-1542, 118 L.Ed.2d 174 (1992) (finding that the defendant's predisposition to act in a certain manner could "hardly support an inference" that he would commit crimes in the future); Powell v. Texas, 392 U.S. 514, 543, 88 S.Ct. 2145, 2159-60, 20 L.Ed.2d 1254 (1968) (Black, J., concurring) (stating that "[p]unishment for a status is particularly obnoxious ... because it involves punishment for a mere propensity, ...") (emphasis added); United States v. Robel, 389 U.S. 258, 265-66, 88 S.Ct. 419, 424-25, 19 L.Ed.2d 508 (1967) (finding that membership in an organization was insufficient basis on which to impute to him the organization's improper goals). Although these cases involved criminal proceedings, they "nevertheless point out the constitutionally significant danger of making status a surrogate for prohibited conduct." Meinhold, 34 F.3d at 1478 (citing cases).

Second, the presumption is not applied equally to heterosexual and homosexual service members. The policy provides that the rebuttable presumption arises only in cases involving self-identified homosexuals, even if there is no actual evidence of homosexual conduct. Such is not the case for self-identified "heterosexual " service members: No presumption arises in cases involving heterosexual service members who admit to engaging in homosexual conduct but promise not to engage in future homosexual acts. DOD Directive 1332.20 at 2- 2; S. Hearing 103-845 at 771-72; Able, 880 F.Supp. at 976 (citing S. Report 103-112 at 294). [FN19]

FN19. Counsel for the Federal defendants conceded during oral argument that if a service member admitted to having committed an act of sodomy, but nevertheless insists that he or she is a hetero sexual, the presumption is not triggered. (RT at 67:14-23.)

The Federal defendants contend that the military is justified in presuming gay service members will engage in proscribed conduct whereas their heterosexual counterparts will not because, unlike homosexual conduct, not all heterosexual acts are disallowed. (Reporter's Transcript ("RT") at 76:18-20.) They further assert that a presumption that gay status will lead to gay conduct is valid because few service members will remain celibate due to the power of the human sex drive. (See Fed.Defs.' Reply at 4-5 (citing S.Rep. 112 at 281, 284).) The Federal defendants note that the D.C. Circuit followed this reasoning in upholding the constitutionality of the new policy. See Steffan v. Perry, 41 F.3d 677, 690 (D.C.Cir.1994) (stating that "the human sexual drive is enormously powerful and that an open declaration that one is a homosexual is a rather reliable indicator as to the direction of one's [sex] drive.") (en banc). The Steffan majority assumed that homosexuals are unable to control their sexual urges. See Steffan, 41 F.3d at 692. Consistent with the foregoing, the Federal defendants argue that the military need not wait for the proscribed act to occur in order to prevent its occurrence, and for that reason, the existence of the rebuttable presumption is rational. [FN20]

FN20. There is no evidence that homosexuals are any less capable of controlling their desires than heterosexuals. See Cammermeyer, 850 F.Supp. at 919. In fact, the Steffan court neglected to recognize that homosexuals have a stronger incentive than heterosexual service members to refrain from proscribed sexual conduct, given the likelihood that it will lead to their expulsion from the military. See id.; see also Constitutional Law--Equal Protection--D.C. Upholds Military Discharge Based On A Statement of Homosexual Orientation--Steffan v. Perry, 41 F.3d 667 (D.C.Cir.1994), 108 Harv.L.Rev. 1779, 1782-83 (1995) ("Although the sexual desires of each group may be equally strong, the desires of homosexuals for sex is not

necessarily greater than their desire to retain their positions in the military."). "There is no reason to believe that such improper behavior, if it occurs, would be more likely to occur because a homosexual has admitted his orientation rather than kept it a secret." Able, 880 F.Supp. at 978.

The Ninth Circuit in Meinhold, however, expressed skepticism as to whether a policy which presumes that homosexuals will engage in proscribed conduct when no similar assumption is made with respect to heterosexuals can ever pass muster under the Constitution:

> Here, the regulation as applied to Meinhold assumes that persons who say they are gay, but who have not acted in accordance with their propensity in the past, will nevertheless act in accordance with their propensity in the future--whether or not to do so is lawful or acceptable military behavior. Yet no similar assumption is made with respect to service-members who are heterosexual. [footnote omitted]. Although courts defer to the military's judgment about homosexual conduct, and classifications having to do with homosexuality may survive challenge if there is any rational basis for them, see Heller v. Doe, [509] U.S. [312], [318-22], 113 S.Ct. 2637, 2642-43, 125 L.Ed.2d 257 (1993); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir.1990), at least a serious question is raised whether it can ever be rational to presume that one class of persons (identified by their sexual preference alone) will violate regulations whereas another class (identified by their preference) will not. [footnote omitted] Meinhold, 34 F.3d at 1477-78 (emphasis added). The court further took issue with the military's contention that it need not wait until homosexual acts have occurred and been detected before taking personnel action:

> > We acknowledge the force of the DOD's argument that it need not take the risk of a person with a homosexual desire or propensity acting on it because of the critical nature of the military mission. [citations.] However, [the] DOD is prepared to take the risk that a servicemember who has committed a homosexual act but isn't homosexual won't do so again. For that reason, its argument is not wholly rational. In any event, the risk factor alone does not eliminate equal protection difficulties. Id. at 1478 n. 11 (emphasis added).

The Federal defendants attempt to discount the significance of Meinhold on the theory that it analyzed the pre-1994 policy excluding gays altogether. (Fed.Defs.' Reply 6-7.) Meinhold cannot be dismissed so lightly. In Meinhold, the Ninth Circuit recognized that the regulations then in effect assumed that "persons who say they are gay, but who have not acted in accordance with their propensity in the past, will nevertheless act in accordance

with their propensity in the future...." Meinhold, 34 F.3d at 1477-78. Notably, the new policy, vis-a-vis the rebuttable presumption, expressly states what was formerly assumed under the old policy. [FN21] In doing so, Congress has enacted the precise constitutional infirmity which Meinhold cautioned against: the conflation of homosexual status with homosexual conduct.

FN21. The Federal defendants' attempt to distinguish Meinhold as being decided under the former policy is rather curious in light of the DOD's admission that the rebuttable presumption in the new policy also existed under the old policy. S.Hrg. 103-845 at 775 ("Senator, the procedure that we have described, this rebuttable presumption, has been in the directive since 1981, ...").

The Court concludes that the policy does, in fact, discriminate against homosexual service members on the basis of status. The rebuttable presumption--which is essentially irrebuttable and itself constitutionally unsound--is a vehicle employed to obscure the congruence between the current policy and the former policy. In actuality, there is no meaningful distinction in this regard, as the current policy essentially elevates form over substance. Thus, under governing jurisprudence, the Court finds that Lt. Holmes' discharge violated his right to equal protection.

3. The Policy Does Not Rationally Further a Legitimate Governmental Interest

Assuming arguendo that the military's policy affecting homosexuals is not impermissibly premised on status, the next question is whether the policy "rationally furthers a legitimate state purpose or interest." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 55, 93 S.Ct. 1278, 1308, 36 L.Ed.2d 16 (1973). The Federal defendants assert the policy furthers the Government's interest in maintaining an effective military force. There is no dispute that this is a legitimate governmental interest. However, the parties vigorously contest whether the military's policy rationally furthers that goal.

First, the Federal defendants maintain that the new policy is necessary to "accommodate the personal privacy interests" of heterosexual service members. [FN22] (See Fed.Defs.' Mot. at 13-14.) The ostensible concern is that such privacy interests will be infringed upon by compelling heterosexual service members to live, sleep and shower with other persons who may find them sexually attractive. The military believes that heterosexual and homosexual personnel should not share billeting arrangements for essentially the same reason that men and women are separated in their personal activities.

FN22. The Court notes that Federal defendants' claim that the policy advances the "privacy interests" of heterosexual service members is somewhat curious given that the policy itself recognizes that military life is often characterized by "little or no privacy." 10 U.S.C. § 654(a)(12).

The military's purported "privacy" justification might be rationally sound if the policy excluded all gays and lesbians from the military. However, this is not what the policy purports to do. The new policy purports to permit gays and lesbians to serve in the military, but in reality, they are allowed to serve only until such time as they reveal their sexual orientation. Consequently, the new policy does nothing to allay heterosexual service members' personal privacy concerns, given that it envisions the presence of homosexuals in the military. See Able, 880 F.Supp. at 978; see also Posner, R., Sex and Reason at 319 (1992) ("The most important reason for doubting that dropping the ban on homosexuals in the military would cause serious morale problems is simply that a large number of homosexuals already serve without significant difficulties.")

Second, the Federal defendants claim that the policy promotes an effective military by preventing "sexual tension." (Fed. Defs.' Mot. at 14-15.) The Federal defendants argue that same sex attractions within a military unit are "distracting," and therefore, likely to disrupt unit cohesion. (Id.) As in the case of the privacy rationale, the Federal defendants cite to the separation of men and women personnel and the fact that "no such accommodation can be made for homosexuals." (Id.)

While the prevention of sexual tension and promotion of unit cohesion are legitimate goals, the policy does not rationally further these interests. As noted, the military's regulations permit homosexuals to serve so long as they, in effect, remain celibate and conceal their sexual orientation. The "sexual attractions" and "tension" which the Federal defendants speculate will result from the presence of homosexuals will, therefore, not be curtailed under the current policy. Far from promoting unit cohesion, the secrecy required under the new policy is likely to foster increased tension and suspicion among heterosexuals as well as suffering and misery among homosexuals. See Able, 880 F.Supp. at 978 ("The only difference will be that heterosexuals will not know which of their servicemates are homosexuals, and heterosexuals will have reason to have a generalized suspicion of everyone in the showers, hardly a circumstance likely to increase 'cohesion.' ").

Finally, the Federal defendants maintain that the exclusion of acknowledged homosexuals is necessary to prevent unit polarization. They claim that unit cohesion is a function of "broad cultural values, norms, and

characteristics that are the result of a common socialization process and basic agreement among unit members about cultural values." (See Fed.Defs.' Mot. at 16 (quoting S.Hrg. 103-845 at 249)). They further contend that "when this (sic) shared cultural values of unit members breaks (sic) down, the result is a loss of unit cohesiveness with often devastating consequences." (Id.)

The Federal defendants do not specify the "shared cultural values" to which they are referring. Presumably, they mean the "cultural values" of heterosexual service members who dislike homosexuals or disapprove of homosexuality. [FN23] The flaw in this argument is that service members who are tolerant of the "homosexual lifestyle" are not foreclosed from service. Moreover, a service member who has "[a]n abstract sexual preference" for the same sex--which is acceptable under the policy--will no doubt be viewed with the same scorn as a homosexual service member who "engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." Stated another way, the characteristics which allegedly result in unit polarization--i.e., same-sex preferences--are shared by both "acceptable" and "unacceptable" homosexuals. The Act and Directives simply do nothing to further unit cohesion.

FN23. The essence of this argument is that unit cohesion will suffer because certain heterosexual service members dislike homosexuals. As set forth infra, the personal prejudices of those service members cannot provide constitutional support for an otherwise irrational policy.

Notwithstanding the rationales articulated by the Federal defendants, this Court finds that there is no "conceivable basis" on which to find the policy is rational. See Heller, 113 S.Ct. at 2643. The DOD Directives state unequivocally that homosexual orientation "is not a bar to continued [military] service...." See DOD Directives 1304.14 at 1-9 and 1332.30 at 2-1. Yet, this same policy renders the single statement "I am gay"--which is nothing more than an articulation of what is supposedly permissible--sufficient to trigger a presumption that the service member should be excluded. This defies logic. The inherent incongruity between what the policy says and what it does in practice is clear evidence that the policy as a whole lacks any semblance of rationality.

4. The Policy is Irrational As a Matter of Law Because it is Based on Private Biases of Others

Entirely aside from the foregoing, even if the Court were to find that the policy furthered a legitimate governmental interest, the Court finds that the policy fails because it impermissibly relies on irrational prejudices against

homosexuals as a group. The Supreme Court has recognized that a discriminatory classification which is based on prejudice or bias is irrational as a matter of law. See Cleburne, 473 U.S. at 450, 105 S.Ct. at 3259-60 (striking down ordinance which was based on an "irrational prejudice against the mentally retarded, ..."). As the Supreme Court recognized in Palmore v. Sidoti, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984), "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Accord United States v. City of Hayward, 36 F.3d 832, 835 (9th Cir.1994) ("the law should not sanction private biases.") (citations omitted), cert. denied, --- U.S. ----, 116 S.Ct. 65, 133 L.Ed.2d 27 (1995). Therefore, a discriminatory policy against gays and lesbians which is based on prejudice cannot be enforced without running afoul of the equal protection clause. Cammermeyer v. Aspin, 850 F.Supp. 910, 915 (W.D.Wash.1994).

The governmental interests asserted by the Federal defendants stem from the fear and discomfort of some service members which results from their knowledge that homosexuals are present. However, the concern asserted by the military is simply another way of saying that the presence of homosexuals makes some service members uncomfortable. While it may be true that some intolerant heterosexual service members are uneasy in the presence of homosexuals, the Court rejects the notion that the bigotry of those service members provides a constitutionally sufficient basis to banish an entire class of persons from the military. This is also significant because it demonstrates that the purported justifications for the new policy stem from and are deeply rooted in hostility and prejudice against homosexuals as a group as opposed to any real concern with particular conduct. The military's true interest is in suppressing expressions of homosexual identity as opposed to protecting heterosexual service members' privacy or preventing sexual tension. In other words, as long as homosexual service members live in a state of secrecy (i.e., "in the closet"), they are eligible for service. The unit cohesion rationale proffered by the Federal defendants in support of the "Don't Ask, Don't Tell" policy is nearly identical to the argument which was used by the military to justify the exclusion of African-Americans from military service. "For much of our history, the military's fear of racial tension kept black soldiers separated from whites. As recently as World War II both the Army chief of staff and the Secretary of the Navy justified racial segregation in the ranks as necessary to maintain efficiency, discipline, and morale." Watkins v. United States Army, 875 F.2d 699, 729 (9th Cir.1989) (Norris, J., concurring); see also Buttino v. FBI, 801 F.Supp. 298, 302 n. 5 (N.D.Cal.1992); Cammermeyer,

850 F.Supp. at 923; Dahl v. Secretary of U.S. Navy, 830 F.Supp. 1319, 1330 (E.D.Cal.1993). [FN24]

FN24. Such justifications have also historically been used to rationalize discriminatory policies. E.g., Plessy v. Ferguson, 163 U.S. 537, 550, 16 S.Ct. 1138, 1143, 41 L.Ed. 256 (1896) (citing the promotion of the "public good" as a basis for upholding the "separate but equal" segregation of the races).

When President Truman courageously issued an Executive Order requiring the racial integration of the armed forces in 1948, he did so despite almost universal opposition from the military. Watkins, 875 F.2d at 729 n. 32. "Dire consequences were predicted for maintaining discipline, building group morale, and achieving military organization goals. None of these predictions has come true." Dahl, 830 F.Supp. at 1330 (quoting a 1988 study concerning gays commissioned by the DOD); see also William N. Eskridge, Jr., Gaylegal Narratives, 46 Stanford L.Rev. 607, 646 n. 57 (1994) (discussing parallels between arguments offered by the military to exclude African-Americans and gays). So too it is with the issue of homosexuals serving in the military. Once again, the military argues that it is entitled to deference in its decision to treat this country's citizens differently, not based on the merits of their qualifications or because of what they have done, but because of who they are. While this Court must be deferential to the decisions of the military, that deference is not absolute. [FN25]

FN25. The danger of such unchecked deference is clearly demonstrated by decisions such as Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), reh'g denied, 324 U.S. 885, 65 S.Ct. 674, 89 L.Ed. 1435 (1945), which upheld the internment of Japanese American citizens in concentration camps during World War II. "That decision, justified by deference to the military's race-based judgment about the threat posed by Japanese Americans, is one of the Court's most embarrassing moments, and has been thoroughly repudiated by history." D. Cole and W. Eskridge, Jr., From Hand-Holding to Sodomy: First Amendment Protections of Homosexual (Expressive) Conduct, 29 Harvard C.R.-C.L. L.R. 319, 343 (1994); see also Hirabayashi v. United States, 828 F.2d 591, 593 (9th Cir.1987) (criticizing military's decision to separate Japanese-Americans).

[45] The Federal defendants insist that "the Senate Committee specifically rejected the notion that the policy was based on irrational stereotypes, ..." (See Fed.Defs.' Reply at 10.) The Court is not so sanguine. The mere fact that Congress has denied any discriminatory motive, however, does not foreclose nor relieve this Court of its responsibility to assess the constitutionality of a

given law or directive. See Weinberger v. Wiesenfeld, 420 U.S. 636, 648, 95 S.Ct. 1225, 1233, 43 L.Ed.2d 514 (1975) ("the mere recitation of a benign ... purpose is not an automatic shield which protects against any inquiry into the actual purpose underlying a statutory scheme."); Lamprecht v. FCC, 958 F.2d 382, 392 n. 2 (D.C.Cir.1992) ("If a legislature could make a statute constitutional simply by 'finding' that black is white, or freedom [is] slavery, judicial review would be an elaborate farce."). In addition, the Federal defendants' contention is highly suspect given the comments of Senator Exon, one of the members of the Senate Committee on Armed Services, who stated that the Committee was fearful of implementing "an unsatisfactory policy and that policy is a policy of open gays in the military, which a great number of us have very serious legitimate concern about." See S.Hrg. 103-845 at 777. Thus, it is evident that the true concern in drafting the policy was the continued exclusion of homosexual service members as opposed to the proscription of homosexual conduct.

That some service members may dislike homosexuals, find their lifestyle immoral, or are otherwise uneasy in their company is not a constitutionally legitimate basis on which to ostracize an entire class of Americans from serving in this country's armed forces. Like African-Americans, homosexuals should not be barred from military service merely because others have irrational prejudices (which demonstrate a need for education). [FN26] Moreover, there can be no legitimate, rational basis for a policy which forces citizens to lie and conceal their identity, simply to accommodate and submit to the bigotry of others. [FN27] While the Court acknowledges that the promotion of an effective military is a legitimate governmental interest, the Court finds that the new policy does not further that interest--and, in fact, severely detracts from it.

FN26. The Bill of Rights is predicated on the notion that the rights of the minority must be protected from assault by the majority. Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir.1990), cert. denied sub nom., 506 U.S. 1027, 113 S.Ct. 675, 121 L.Ed.2d 598 (1992) (stating that "bold purpose" of the Bill of Rights is "to protect minority rights, not to enforce homogeneity."). The "Don't Ask, Don't Tell" policy violates this fundamental notion. By promulgating and seeking to enforce the ban on gays from the military, the military is officially sanctioning and encouraging homophobia.

FN27. By forcing homosexual service members to conceal their sexual orientation, the policy actually undermines the effectiveness of the military by potentially creating security concerns. By requiring homosexuals to live in a state of secrecy and constant fear of exposure, the policy creates opportunities for blackmail of those service members who wish to remain in service. Cf.,

Watkins, 875 F.2d at 731 (Norris, J., concurring) ("It is evident ... that homosexuality poses a special risk of blackmail only if a homosexual is secretive about his or her sexual orientation.")

At bottom, despite the defendants' assertions to the contrary, it is apparent that the new policy is purposefully directed at excluding homosexuals as a group. The drafters of the new policy have merged the concepts of status and conduct in an attempt to circumvent the constitutional proscriptions articulated in Meinhold. The new policy does not penalize service members merely for engaging in homosexual conduct--it punishes them for simply acknowledging their status. As such, the Court summarily adjudicates plaintiff's federal equal protection claim in his favor.

C. First Amendment

Plaintiff's Ninth Claim for Relief alleges that defendants violated his rights to free speech and free expression which are protected under the First Amendment to the United States Constitution. See U.S. Const. amd. I. ("Congress shall make no law ... abridging the freedom of speech....") "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." Rosenberger v. Rector and Visitors of the Univ. of Virginia, --- U.S. ----, ----, 115 S.Ct. 2510, 2516, 132 L.Ed.2d 700 (1995). Pure speech, no matter how offensive or controversial, is entitled to the highest protection. See Texas v. Johnson, 491 U.S. 397, 414, 109 S.Ct. 2533, 2545, 105 L.Ed.2d 342 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit expression of an idea simply because society finds the idea itself offensive or disagreeable."). "Discrimination against speech because of its message is presumed to be unconstitutional." Rosenberger, --- U.S. at ----, 115 S.Ct. at 2516.

Although the protections of the First Amendment are generally broad, the Supreme Court has cautioned that "[judicial] review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws and regulations designed for civilian society." Goldman, 475 U.S. at 507, 106 S.Ct. at 1313 (holding that First Amendment did not prevent military from disallowing an Orthodox Jewish service member from wearing a yarmulke). Nevertheless, the military's need for discipline and order, which underlies such deference, does "not, of course, render entirely nugatory in the military context the guarantees of the First Amendment." Id. Therefore, in the context of the military, regulation of speech based on content survives constitutional scrutiny only if it is "no more than [what is] reasonably necessary to protect [a] substantial government

interest." Brown v. Glines, 444 U.S. 348, 355, 100 S.Ct. 594, 600, 62 L.Ed.2d 540 (1980).

Here, there is no legitimate dispute that the Act and Directives are content-based, as they target service members who acknowledge their homosexuality. See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, --- U.S. ----, ----, 115 S.Ct. 2338, 2346, 132 L.Ed.2d 487 (1995); accord Elzie v. Aspin, 897 F.Supp. 1, 5 (D.C.Dist.1995). Nevertheless, the Federal defendants contend that the new policy does not impermissibly infringe on plaintiff's First Amendment rights. They argue that the new policy is directed at conduct, not speech, and that speech disclosing one's sexual orientation justifiably evidences the service member's likelihood of engaging in homosexual acts. The Federal defendants assert that under this rationale, the Ninth Circuit has consistently rejected first amendment claims brought under the military's former policy.

These arguments lack merit. The current policy expressly provides that a service member's "sexual orientation ... is not a bar to service entry or continued service. Homosexual conduct, however, is grounds for separation from the Military Services." DOD Directive 1332.30 at 2-1 (emphasis added). While a service member's acknowledgment of orientation is necessarily evidence that he or she is a homosexual, it is not necessarily evidence that the service member is likely to engage in proscribed conduct in violation of military law. An acknowledgment of sexual orientation is nothing more than a verbalization of what the military has expressly stated is permissible. To conclude, as the Federal defendants urge, that disclosing one's homosexual orientation, in and of itself, has evidentiary significance beyond mere confirmation of one's sexual orientation would literally render hollow the military's express pronouncement--"a member's sexual orientation ... is not a bar to service entry or continued service." The member's statement of status only acquires independent significance by virtue of the presumption attached to that statement. As a result of this presumption, the statement confirming one's status becomes the proscribed "conduct" for which a service member may be discharged. See Able, 880 F.Supp. at 976 ("under the First Amendment a mere statement of homosexual orientation is not sufficient proof of intent to commit acts as to justify the initiation of discharge proceedings.").

The Court also finds the Ninth Circuit cases cited by the Federal defendants provide little support for their argument. Unlike this case, those cases were all decided under the military's former policy which expressly discriminated against homosexuals on the basis of their orientation. That distinction is significant because a statement of "I am gay" is direct evidence

of the person's sexual orientation. See Pruitt, 963 F.2d at 1164. Since the express purpose of the current policy is to address conduct alone, the logic of those cases does not bar plaintiff's first amendment claim. [FN28]

FN28. The Federal defendants also assert that any infringement on Lt. Holmes' first amendment rights is justifiable because homosexual conduct impairs military readiness. (See Fed.Defs.' Mot. at 18.) However, this argument fails for the reasons previously discussed in the context of plaintiff's equal protection claim.

The Court concludes that the military's current policy discriminating against homosexuals violates plaintiff's rights under the First Amendment. The fact that the military attaches severe evidentiary significance to a statement of status demonstrates that the new policy is directed at speech, not conduct. Indeed, whether or not the homosexual service member ever actually engages in the conduct is, as a practical matter, inconsequential. Because the new policy infringes on Lt. Holmes' fundamental right to freedom of speech, the Court summarily adjudicates this claim in favor of plaintiff.

D. Substantive Due Process

Lt. Holmes' twelfth claim for relief avers that he was discharged under the Act and Directives "based on his status as a gay man, rather than on the basis of his conduct" in violation of his substantive right to due process. (Am.Compl. ¶ 105.) Substantive due process guards against arbitrary and capricious governmental action. Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1407 (9th Cir.1989), cert. denied, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990). "Substantive due process was the doctrine of choice for the protection of fundamental rights during the first half of this century, although it now has largely been replaced by other constitutional doctrines." Yniguez v. Arizonans for Official English, 69 F.3d 920, 945 n. 29 (9th Cir.1995) (en banc), cert. granted, --- U.S. ----, 116 S.Ct. 1316, 134 L.Ed.2d 469 (1996).

The rights plaintiff seeks to vindicate through his substantive due process claim are duplicative of those asserted in his equal protection and first amendment claims. As those constitutional provisions more specifically address the rights plaintiff seeks to vindicate, the Court concludes that dismissal of plaintiff's substantive due process claim is appropriate. See Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989) (improper to analyze excessive force claim under substantive due process where specific constitutional provision applicable); Armendariz v. Penman, 75 F.3d 1311, 1318 (9th Cir.1996) (finding that "the plaintiff's

substantive due process claim fails because it is preempted by other constitutional claims under the rule of Graham....").

E. Remaining Claims

The defendants move for dismissal of Lt. Holmes' claims that the policy violates his right to intimate associations, the policy is vague and overbroad, and that the policy violates his right to privacy. Plaintiff offers no meaningful response in opposition to the dismissal of these claims. Therefore, the Court dismisses plaintiff's Tenth, Eleventh and Thirteenth Claims for Relief.

CONCLUSION

Defendants separated Lt. Holmes from the state and federal national guards solely because of who he is, and not for anything he had done. Despite their stated goal of proscribing homosexual conduct while ostensibly permitting homosexuals to serve, the Act and Directives target and punish service members who simply acknowledge who they are. This is impermissible under our Constitution.

Accordingly,

IT IS HEREBY ORDERED THAT:

1. Plaintiff's motion to strike the California defendants' untimely opposition is GRANTED.

2. Plaintiff's cross-motion for summary adjudication is GRANTED with respect to his federal equal protection and freedom of speech claims. Plaintiff's motion is DENIED in all other respects.

3. The Federal defendants' motion to dismiss is GRANTED with respect to plaintiff's federal claims based on vagueness and overbreadth, substantive due process, intimate associations, and the right to privacy. The Federal defendants' motion is DENIED in all other respects.

4. The California defendants' motion to dismiss is DENIED with respect to plaintiff's federal equal protection and freedom of speech claims, and is GRANTED in all other respects. Plaintiff's state law claims are DISMISSED WITHOUT PREJUDICE to plaintiff bringing them in the appropriate state forum.

5. Defendants shall reinstate Lt. Holmes to the CANG and restore his federal officer status in the USANG. Defendants are permanently enjoined from further proceedings against Lt. Holmes based on the Act and Directives as set forth above.

IT IS SO ORDERED.

APPENDIX E

THE CONSTITUTION OF THE UNITED STATES

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or the Militia, when in actual service on the time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

APPENDIX F

5 U.S.C.A. § 706

UNITED STATES CODE ANNOTATED TITLE 5.

GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I--THE AGENCIES GENERALLY

CHAPTER 7--JUDICIAL REVIEW

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX G

10 U.S.C.A. § 654

TITLE 10. ARMED FORCES

SUBTITLE A--GENERAL MILITARY LAW

PART II--PERSONNEL

CHAPTER 37--GENERAL SERVICE REQUIREMENTS

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§ 654. Policy concerning homosexuality in the armed forces

a) Findings.--Congress makes the following findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

(2) There is no constitutional right to serve in the armed forces.

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

(8) Military life is fundamentally different from civilian life in that--

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(b) Policy.--A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that--

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

(c) Entry standards and documents.--

(1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

(d) Required briefings.--The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uniform Code of Military

Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

(e) Rule of construction.--Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that--

(1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and

(2) separation of the member would not be in the best interest of the armed forces.

(f) Definitions.--In this section:

(1) The term "homosexual" means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms "gay" and "lesbian".

(2) The term "bisexual" means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

(3) The term "homosexual act" means--

(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

APPENDIX H

Department of Defense
DIRECTIVE

December 21, 1993 #
NUMBER 1332.30

SUBJECT: Separation of Regular Commissioned Officers

References: (a) DoD Directive 1332.30, "Separation of Regular Commissioned Officers for Cause," February 12,1986 (hereby canceled)
(b) Chapter 60 and Sections 618, 630, *654,* 827, and 831 of title 10, United States Code
(c) DoD Directive 1010.4, "Alcohol and Drug Abuse by DoD Personnel," August 25, 1980
(d) DoD 5200.2-R, "DoD Personnel Security Program," January 1987, authorized by DoD Directive 5200.2, May 6, 1992
(e) Sections 801-940 of title 10, United States Code, "Uniform Code of Military Justice"
(f) DoD Instruction *5505.8,* "Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations," February 28, 1994

A. REISSUANCE AND PURPOSE

This Directive:

1. Reissues reference (a)

2. Implements Chapter 60 and Section 630 of reference

(b) to update policy, responsibilities, and procedures governing the administrative separation of commissioned officers for substandard performance of duty, for an act or acts of misconduct or moral or professional dereliction, or in the interest of national security.

3. Implements Chapter 60 and Section 630 of reference (b) on the discharge of regular commissioned officers with less than 5 years active commissioned service in certain circumstances.

B. APPLICABILITY AND SCOPE

This Directive:

1. Applies to the Office of the Secretary of Defense (OSD) and to the Military Departments. The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.

2. Applies to regular commissioned officers of the Military Services.

3. Does not apply to commissioned warrant officers and retired commissioned officers of the Military Services.

[2]

C. DEFINITIONS

Terms used in this Directive are defined in enclosure 1.

D. POLICY

1. It is DoD policy to:

a. Promote the readiness of the Military Services by maintaining high standards of conduct and performance. An individual is permitted to serve as a commissioned officer in the Military Services because of the special trust and confidence the President and the nation have placed in his or her patriotism, valor, fidelity, and competence. Commissioned officers are expected to display responsibility commensurate to this special trust and confidence and to act with the highest integrity at all times.

b. Judge the suitability of persons to serve in the Armed Forces on the basis of their conduct and their ability to meet required standards of duty performance and discipline.

c. Separate from Military Service those commissioned officers who will not or cannot exercise the responsibility, fidelity, integrity, or competence required of them to:

(1) Ensure that the Military Services meet rigorous and necessary standards of duty, performance, and discipline.

(2) Maintain those high standards of performance and conduct through appropriate actions that sustain the traditional concept of honorable Military Service.

2. Notwithstanding any other provision of this Directive, the Secretaries of the Military Departments concerned may discharge regular commissioned

Service when there is a need to reduce the number of officers in that Service to meet budgetary or force size requirements. The provisions of Enclosure 6 do not apply to the discharge of probationary officers under this authority.

3. The Assistant Secretary of Defense for Personnel and Readiness (ASD(P&R)), in coordination with the Secretaries of the Military Departments, shall ensure that officers separated under this Directive are fully informed of assistance available from the Department of Defense to assist them in the transition to civilian life.

E. RESPONSIBILITIES

1. The Assistant Secretary of Defense for Personnel and Readiness shall supplement this Directive, as needed.

2. The Secretaries of the Military Departments shall:

a. Prescribe regulations consistent with the policy and procedures contained in this Directive.

[3]

b. Ensure, through their military commanders, that the policies, standards and procedures of this Directive are applied consistently, that fact-finding inquiries are conducted properly, that no abuse of authority occurs, and that failure to follow the provisions of this Directive results in appropriate corrective action.

c. Address any recommendations for policy changes in this Directive to the ASD(P&R).

F. PROCEDURES

Procedures and standards for implementation of the policy in section D., above, are in enclosures 2 through 8.

G. EFFECTIVE DATE AND IMPLEMENTATION

1. This Directive is effective February 28, 1994.

2. This Directive applies only to administrative separation proceedings initiated on or after February 28,1994, unless the Secretary of the Service concerned determines that it should be applied in a particular case in which proceedings were initiated before that date.

3. Forward two copies of proposed implementing documents to the Assistant Secretary of Defense for Personnel and Readiness within 30 days of the signature date.

/S/
Les Aspin

Enclosures - 8

1. Definitions
2. Reasons for Separation
3. Procedures for Nonprobationary Officers
4. Composition of Boards
5. Board of Inquiry Procedures
6. Procedures for Certain Probationary Officers
7. Character of Discharge
8. Guidelines for Fact-Finding Inquiries into Homosexual Conduct

[ENCLOSURE 1]

[1-1]

DEFINITIONS

1. Active Commissioned Service. Service on active duty as a commissioned officer in a grade above warrant officer. W4

2. Bisexual. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

3. Commissioned Officer. An officer in any of the Military Services who holds a grade and office under a commission signed by the President, other than a commissioned warrant officer or retired commissioned officer.

4. Convening Authority. The Secretary of the Military Department concerned who may delegate this responsibility as appropriate.

5. Counsel. A lawyer qualified under 10 U.S.C. 827 (b)(1) (reference (b)) or a civilian lawyer retained at the commissioned officer's expense.

6. Drug Abuse. As defined in DoD Directive 1010.4 (reference (c)).

7. Homosexual. A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

8. Homosexual Act

   a. Any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires, and

b. Any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in paragraph 8.a., above.

9. Homosexual Conduct. A homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

10. Legal advisor. A judge advocate qualified under 10 U.S.C. 827 (b)(1) (reference (b)) and appointed to assist a Board of Inquiry.

11. Nonprobationary Commissioned Officer. A commissioned officer other that [sic] a probationary commissioned officer.

12. Probationary Commissioned Officer. A Commissioned officer with less that [sic] 5 years of active commissioned service; however, a regular commissioned officer serving on active duty on September 14, 1981, shall be a probationary commissioned officer for a period of 3 years from the date of his or her appointment as a regular commissioned officer.

13. Propensity. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

14. Respondent. A commissioned officer required to show cause for retention on active duty.

15. Separation. Discharge, retirement, or resignation.

[1-2]

16. Sexual Orientation. An abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.

17. Show-Cause Authority. Any of the following as determined by the Secretary of the Military Department concerned:

a. Commanders exercising General Court Martial authority and all general or flag rank officers in command who have a judge advocate or legal advisor available.

b. The Secretary of the Military Department concerned or officers (not below the grade of major general or rear admiral) designated by the Secretaries of the Military Departments to determine, based on a record review, that an officer shall be required to show case [sic] for retention on active duty.

18. Statement that a Member Is a Homosexual or Bisexual or Words to That Effect. Language or behavior that a reasonable person would believe was intended to convey the statement that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.

[ENCLOSURE 2]

[2-1]

REASONS FOR SEPARATION

A. SUBSTANDARD PERFORMANCE OF DUTY

A commissioned officer may be separated from a Military Service, under regulations prescribed by the Secretary of the Military Department concerned, when, as compared to other commissioned officers of his or her grade and experience, he or she is found to be substandard in any of the following respects:

1. Performance of duty.

2. Efficiency.

3. Leadership.

4. Lack of response to training, in that performance of duties in the officer's assigned specialty is precluded or impaired to the degree of being unsatisfactory.

5. Attitude or character.

B. ACTS OF MISCONDUCT OR MORAL OR PROFESSIONAL DERELICTION

A commissioned officer may be separated from a Military Service, under regulations prescribed by the Secretary of the Military Department concerned, when he or she is found to have committed an act or acts of misconduct or moral or professional dereliction, which include (but are not limited to):

1. Serious or recurring wrongdoing, punishable by military or civilian authorities.

2. Intentional or discreditable mismanagement of personal affairs, including finance affairs.

3. Drug abuse.

4. Intentional neglect of, or failure to perform, assigned duties or complete required training.

5. Conduct resulting in the loss of professional status to such an extent as to impair performance of assigned military duties.

6. Intentional misrepresentation of facts in obtaining an appointment or in official statements or records.

C. HOMOSEXUAL CONDUCT

Homosexual conduct is grounds for separation from the Military Services under the terms set forth in paragraph C. 1 .b., below. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service under this section unless manifested by homosexual conduct in the manner described in section C 1.

[2-2)

1. A commissioned officer shall be separated under this provision if one or more of the following approved findings is made:

a. The officer has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are approved further findings that the officer has demonstrated that:

(1) Such acts are a departure from the officer's usual and customary behavior;

(2) Such acts under all the circumstances are unlikely to recur;

(3) Such acts were not accomplished by use of force, coercion, or intimidation;

(4) Under the particular circumstances of the case, the officer's continued presence in the Armed Forces is consistent with the interests of the Armed Forces in proper discipline, good order, and morale of the Service; and

(5) The officer does not have a propensity or intent to engage in homosexual acts.

b. The officer has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a

further approved finding that the officer has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. A statement by an officer that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts The officer shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. In determining whether an officer has successfully rebutted the presumption that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered:

(1) Whether the officer has engaged in homosexual acts;'

(2) The officer's credibility;

(3) Testimony from others about the officer's past conduct, character, and credibility;

(4) The nature and circumstances of the officer's Staten, statement;

(5) Any other evidence relevant to whether the officer is likely to engage in homosexual acts.

(This list is not exhaustive; any other relevant evidence may also be considered.)

[2-3]

c. The officer has married or attempted to marry a person known to be of the same sex (as evidenced by the external anatomy of the persons involved).

2. The commissioned officer shall bear the burden of proving throughout the proceedings, by a preponderance of the evidence, that retention is warranted under the limited circumstances described in paragraphs C.i.a. and C. 1 .b. of this enclosure, above.

3. Nothing in this Directive or the Service implementing regulations requires that an officer be processed for separation when a determination is made in accordance with regulations prescribed by the Secretary concerned that:

a. The officer engaged in acts, made statements, or married or attempted to marry a person known to be of the same biological sex for the purpose of avoiding military service; and

b. Separation of the officer would not be in the best interest of the Armed Forces.

D. RETENTION IS NOT CONSISTENT WITH THE INTERESTS OF NATIONAL SECURITY

Under DoD 5200.2-R (reference (d)), a commissioned officer may be separated from a Military Service when it is determined that the commissioned officer's retention is clearly inconsistent with the interest of national security.

E. MULTIPLE REASONS

A commissioned officer may be considered for separation under all the reasons in Sections A., B., C., and D. of this enclosure above; however, separate findings under each applicable section shall be required as to the reasons for separation.

[ENCLOSURE 3]

[3-1]

PROCEDURES FOR NONPROBATIONARY COMMISSIONED OFFICERS

A. INITIATION OF ACTION

The Secretary of each Military Department shall prescribe procedures for the initiation of separation recommendations.

B. SHOW-CAUSE AUTHORITY

1. The show-cause authority will determine whether an officer shall be required to show cause for retention on active duty for one or more of the reasons listed in enclosure 2, and as further defined by the Secretary of the Military Department concerned.

2. The show-cause authority shall:

a. Evaluate all information presented concerning the case under consideration.

b. Determine whether the record is sufficient to require the officer to show cause for retention on active duty.

c. Under regulations prescribed by the Secretary concerned, close the case if the authority determines that the officer should not be required to show cause for retention on active duty.

d. Report the matter for referral to a Board of Inquiry if the authority determines that the officer should be required to show cause for retention on active duty. The reasons for making such a determination shall be provided to the officer in writing.

e. Refer the case to a Board of Inquiry if the record supports a finding of homosexual conduct under enclosure 2.

f. Consider the initiation of separation action if the record supports a finding of drug abuse under enclosure 2.

3 As provided in 10 U.S.C. 618(b)(2) (reference (b)), the Secretary concerned may require an officer to show cause for retention on active duty based upon the recommendation of a promotion selection board.

C. BOARD OF INQUIRY

1. Composition. See enclosure 4.

2. Convening. A Board of Inquiry shall be convened under such regulations as may be prescribed by the Secretary of the Military Department concerned.

3. Function. A Board of Inquiry shall give a fair and impartial hearing to a respondent. The Board of Inquiry is an administrative board that shall consider all relevant and material evidence pertaining to the case and shall

function under rules and procedures established by the Secretary of the Military Department concerned. The Board of Inquiry shall make findings of fact and a recommendation as to whether a respondent should be retained on active duty. The board also shall recommend the character of discharge in accordance with regulations prescribed by the Secretary of the Military Department concerned, if it recommends discharge. Its findings must be supported by a preponderance of the evidence. The proceedings and hearing before a Board of Inquiry are intended to give the officer an opportunity to respond to, and rebut, the basis for the contemplated change of status, after

having been informed of the contemplated change and the reasons therefor. The hearing shall provide a forum for why the officer concerned thinks the contemplated action should not be taken.

4. Determinations

a. If a Board of Inquiry determines that the respondent's retention on active duty is warranted, the case is closed. In the case of homosexual conduct, the board shall make specific findings of the reasons warranting retention in accordance with enclosure 2

b. If a Board of Inquiry determines that the respondent's retention on active duty is not warranted, it shall report die matter to a Board of Review, making specific findings of the reasons retention is not warranted and, if appropriate, stating the character of discharge to be issued to the respondent.

D. BOARD OF REVIEW

1. Composition. See enclosure 4.

2. Convening. A Board of Review shall be convened under such regulations prescribed by the Secretary of the Military Department concerned.

3. Function. After a Board of Inquiry has determined a respondent has failed to establish that retention on active duty is warranted, the Board of Review shall review the record for the purpose of examining the grounds for such determination.

4. Determinations

a. If a Board of Review determines that the respondent has established that retention on active duty is warranted, the case is closed. In the case of homosexual conduct, the board shall make specific findings of the reasons warranting retention in accordance with enclosure 2.

b. If a Board of Review determines that the respondent has failed to establish that retention on active duty is warranted, the Board of Review shall recommend to the Secretary of the Military Department concerned that the respondent should be separated, making specific findings of the reasons retention is not warranted and, if appropriate, stating the character of discharge to be issued to the respondent.

E. ACTION BY THE SECRETARY OF THE MILITARY DEPARTMENT CONCERNED UPON RECOMMENDATION OF THE BOARD OF REVIEW

If the Board of Review recommends that the respondent not be retained on active duty, the Secretary of the Military Department concerned may direct:

1. Separation.

2. Retention.

The action of the Secretary is final.

F. RETIREMENT OR DISCHARGE

1. Retirement. A commissioned officer separated from active duty in accordance with this Directive, if eligible for voluntary retirement under any provisions of law on the date of such separation, shall be retired in the grade and with the retired pay for which eligible if retired under such provision.

2. Discharge. A commissioned officer separated from active duty in accordance with this Directive, if ineligible for retirement under any provision of law on the date of such separation, shall be:

a. Honorably discharged in the grade then held if separated only for substandard performance of duty; or

b. Discharged in the grade then held if separated for misconduct, for moral or professional dereliction, homosexual conduct, or in the interest of national security. The character of discharge shall be determined by the Secretary of the Military Department concerned but in no case shall it be more severe than that recommended by the Board of Inquiry.

G. APPLICATION FOR RETIREMENT OR DISCHARGE

At any time before final action in the case, the Secretary of the Military Department concerned may grant a request by the commissioned officer concerned for:

1. Voluntary retirement.

2. Discharge.

The action of the Secretary is final.

H. LIMITATIONS

1. A commissioned officer required to show cause for retention on active duty because of substandard performance of duty and who is retained

on active duty by a Board of Inquiry or a Board of Review may not again be required to show cause for retention for the same reasons within the one year period beginning on the date of the determination to retain.

2. Subject to paragraph H.3., below, a commissioned officer required to show cause for retention on active duty because of misconduct, moral or professional dereliction, homosexual conduct, or in the interest of national security, and who is retained on active duty by a Board of Inquiry or a Board of Review may again be required to show cause for retention at any time.

3. A commissioned officer may not again be required to show cause for retention on active duty solely because of conduct that was the subject of the previous proceedings, unless the findings and recommendations of the

[3-4]

Board of Inquiry or Board of Review that considered the case are determined to have been the result of fraud or collusion.

[ENCLOSURE 4]

[4-1]

COMPOSITION OF BOARDS

A. COMPOSITION

Each board convened in accordance with this Directive shall be composed of at least three commissioned officers having the qualifications prescribed by section B. of this enclosure. The senior member shall be the President of the Board. A nonvoting legal advisor may also be appointed to assist the Board of Inquiry.

B. OFFICERS ELIGIBLE TO SERVE ON BOARDS

1. Each commissioned officer who serves on a board must be an officer on the active duty list of the same Military Service as the respondent.

2. A commissioned officer may not serve on a board unless he or she is serving on active duty in a grade above lieutenant colonel or commander, and is senior in grade and rank to any respondent being considered by the board.

3. If qualified commissioned officers from the active duty list are not available in sufficient numbers to comprise a board, the Secretary of the Military Department concerned shall complete the membership of the board by appointing retired regular commissioned officers of the same Military Service. The retired grade of such officers must be above lieutenant colonel or

commander and must be senior to the grade held by any respondent being considered by the board.

4. No person shall be a member of more than one board convened under this Directive to consider the same respondent.

[ENCLOSURE 5]

[5-1]

BOARD OF INQUIRY PROCEDURES

A. CHALLENGES

Under regulations prescribed by the Secretary of the Military Department concerned, board members are subject to challenge for cause only. In the event the membership of the board is reduced to less than three officers, the convening authority shall appoint additional members.

B. LEGAL ADVISOR

The legal advisor, if appointed, shall perform such functions as the Secretary of the Military Department concerned may prescribe except that the legal advisor has no authority to dismiss any allegation against the respondent or to terminate the proceedings.

C. RECORDER

The Government may be represented before the board by a recorder whose duties shall be prescribed by the Secretary of the Military Department concerned.

D. RIGHTS OF A RESPONDENT REQUIRED TO SHOW CAUSE FOR RETENTION BEFORE A BOARD OF INQUIRY

1. When the case is referred to a Board of Inquiry, the respondent shall be notified in writing, at least 30 days before the hearing, of the reasons for which he or she shall be required to show cause for retention on active duty and of the least favorable characterization of discharge for which the officer may be recommended.

2. The respondent shall be allowed a reasonable period of time, as determined by the Board of Inquiry, to prepare his or her showing of cause for retention on active duty.

3. The respondent may appear in person at all proceedings of the Board of Inquiry.

4. The respondent may be represented either by military counsel appointed by the convening authority or by military counsel of the respondent's own choice (if the counsel of choice is determined to be reasonably available under regulations prescribed by the Secretary of the Military Department concerned), but not by both. The respondent may employ civilian counsel, at no expense to the Government, in which case no military counsel shall be assigned, if so provided by regulations of the Secretary of the Military Department concerned.

5. The respondent shall be allowed full access to, and be furnished copies of, records relevant to the case; however, the Board of Inquiry shall be assigned, if so provided by regulations of the Secretary of the Military Department concerned.

5. [sic] The respondent shall be allowed full access to, and be furnished copies of, records relevant to the case; however, the Board of Inquiry shall withhold any records that the Secretary of the Military Department concerned determines should be withheld in the interest of national security. When any records are withheld, the respondent shall be furnished, to the extent practicable, a summary of the records so withheld.

6. The respondent may request the appearance before the board of any witness whose testimony is considered to be pertinent to his or her case. A determination on the availability of the witness or whether the witness shall

[5-2]

be required to appear, and the materiality of the witness, shall be made pursuant to regulations of the Secretary of the Military Department concerned. Witnesses not on active duty must appear voluntarily and at no expense to the Government, except as otherwise authorized by the Secretary of the Military Department concerned.

7. Subject to regulations prescribed by the Secretary of the Military Department concerned, the respondent may submit, at any time before the board convenes or during the proceedings, documents from his or her record of service, letters, answers, depositions, sworn or unsworn statements, affidavits, certificates, or stipulations. These documents may include depositions of witnesses not deemed to be reasonably available or of witnesses unwilling to appear voluntarily.

8. The respondent may testify in his or her behalf subject to the provisions of 10 U.S.C. 831 (Article 31 of the Uniform Code of Military Justice) (reference (b)).

9. The respondent and his or her counsel may question any witness who appears before the board.

10. The respondent or counsel for the respondent may present oral or written argument, or both, on the matter to the board.

11. The respondent may, under regulations prescribed by the Secretary of the Military Department concerned, request a continuance, when necessary, for the preparation of his or her case before the board.

E. BOARD DETERMINATION

The Board of Inquiry shall decide the case on the evidence received or developed during open hearings. Voting shall be conducted in closed session with only voting members of the board in attendance. All findings and recommendations shall be determined by a majority vote.

F. REPORT OF PROCEEDINGS

The record of proceedings shall be kept in summarized form unless a verbatim record is required by the Show Cause Authority (SCA) or the Secretary of the Military Department concerned. In all cases, the findings and recommendations of the Board of Inquiry shall be stated in clear and concise language and shall be signed by all members concurring. Those members not concurring in the findings or recommendations, or both, may file a statement of nonconcurrence, and the reasons therefor, for inclusion in the record. The respondent shall be provided a copy of the report of the proceedings and the findings and recommendation of the board and shall be provided an opportunity to submit written comments for consideration by the Board of Review. When the Board of Inquiry determines that retention on active duty is warranted, and the case is closed, a summarized report of the proceedings may be prepared pursuant to regulations prescribed by the Secretary of the Military Department concerned.

[ENCLOSURE 6]

[6-1]

PROCEDURES FOR CERTAIN PROBATIONARY COMMISSIONED OFFICERS

A. INITIATION OF ACTION

The SCA may initiate action for any of the reasons stated in enclosure 2 of this Directive, or for such other reasons as the Secretary of the Military Department concerned may prescribe by regulation. Prior to forwarding the

record to the Secretary of the Military Department concerned, the commissioned officer shall be advised in writing of the following:

1. The reason action was initiated and the character of discharge recommended.

2. That he or she may tender a resignation.

3. That he or she may submit a rebuttal or declination statement instead of a resignation.

4. That he or she may confer with appointed or retained counsel.

The officer shall be permitted a reasonable period of time to prepare his or her response.

B. PROCESSING

1. If submitted, the resignation, with the record, shall be forwarded to the authority designated to take final action.

2. If the officer does not tender a voluntary resignation, or if voluntary resignation is not accepted by the Departmental Secretary, the case shall be returned to the SCA for action. If, under regulations of the Secretary concerned, the SCA determines the officer shall be separated with a general discharge, the SCA may refer the case to a Board of Officers or a Board of Inquiry, as determined appropriate, or submit the case to the Secretary concerned who will take a final action. If the SCA determines the officer should be separated with an Other Than Honorable Discharge, the SCA shall refer the case directly to a Board of Inquiry in accordance with Sections C, D, and E of enclosure 3.

3. If the commissioned officer does not tender a resignation statement, and an "Honorable" discharge is recommended by a Board of Inquiry, the record and any rebuttal shall be submitted to the Secretary of the Military Department concerned for final decision.

4. The Secretary of the Military Department concerned may direct referral of the record to a Board of Inquiry whenever the Secretary considers such action appropriate, and the case shall be processed in accordance with sections C., D., and E. of enclosure 3.

C. FINAL DETERMINATION

The Secretary of the Military Department concerned may direct:

1. Retention.

2. Discharge.

The action of the Secretary is final.

[ENCLOSURE 7]

[7-I]

CHARACTER OF DISCHARGE

A. DISCHARGE FOR SUBSTANDARD PERFORMANCE OF DUTY

A discharge shall be characterized as "honorable" when substandard performance of duty is the sole basis for the discharge.

B. DISCHARGE FOR MISCONDUCT, OR FOR MORAL OR PROFESSIONAL DERELICTION, OR HOMOSEXUAL CONDUCT, OR IN THE INTERESTS OF NATIONAL SECURITY

A discharge shall be characterized as "Honorable," "General (Under Honorable Conditions)", or "Under Other Than Honorable Conditions."

1. Consideration. The character of a discharge shall be predicated on the commissioned officer's behavior and performance of duty while a member of a Military Service.

Characterization normally shall be based on a pattern of behavior and duty performance rather than an isolated incident. There are circumstances, however, in which conduct reflected by a single incident may provide the basis for characterization.

2. Exceptions

a. A discharge shall be characterized as "Honorable" when the grounds for discharge are based solely on pre-Service activities, other than intentional misrepresentation, or omission of facts, in obtaining an appointment or in official statements or records.

b. A discharge shall be characterized as "Honorable" or "Under Honorable Conditions" when the sole basis for separation is homosexual conduct unless aggravated acts are included in the findings A separation "Under Other Than Honorable Conditions" may be issued if there is a finding that the officer attempted, solicited, or committed a homosexual act:

(1) By using force, coercion, or intimidation.

(2) With a person under 16 years of age.

(3) With a subordinate in circumstances that violate the customary military superior-subordinate relationship.

(4) Openly in public view.

(5) For compensation.

(6) Aboard a military vessel or aircraft.

(7) In another location subject to military control under aggravating circumstances, noted in the finding, that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

[ENCLOSURE 8]

[8-1]

GUIDELINES FOR FACT-FINDING INQUIRIES INTO HOMOSEXUAL CONDUCT

A. RESPONSIBILITY

1. Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct. A commander may initiate a fact-finding inquiry only when he or she has received credible information that there is basis *for* discharge. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.

2. A fact-finding inquiry may be conducted by the commander personally or by a person he or she appoints. It may consist of an examination of the information reported or a more extensive investigation, as necessary.

3. The inquiry should gather all credible information that directly relates to the grounds for possible separation. Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.

4. If a commander has credible evidence of possible criminal conduct, he or she shall follow the procedures outlined in the Manual for Courts-Martial and implementing regulations issued by the Secretaries of the Military Departments concerned.

5. The guidelines in this enclosure do not apply to activities of Defense Criminal Investigative Organizations and other DoD law enforcement organizations, which are governed by DoD Instruction *5505.8* (reference (f)).

B. DEFINITIONS

1. Bisexual. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

2. Commander. A commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a "command."

3. Homosexual. A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

4. Homosexual Conduct. "Homosexual conduct" is a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

a. A "homosexual act" means any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires and any bodily contact (for example, hand-holding or kissing, in most circumstances) that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act.

b. A "statement that a member is a homosexual or bisexual, or words to that effect," means (1) language or behavior that (2) a reasonable person would believe (3) was intended to convey the statement (4) that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts. This may include statements such as "I am a homosexual," "I am gay," "I am a lesbian," "I have a homosexual orientation," and the like.

c A "homosexual marriage or attempted marriage" is when a member has married or attempted to marry a person known to be of the same biological sex.

[8-2]

d. "Propensity to engage in homosexual acts" means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

5. Sexual Orientation. An abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.

C. BASES FOR CONDUCTING INQUIRIES

1. A commander will initiate an inquiry only if he or she has credible information that there is a basis for discharge. Credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that there is a basis for discharge. It requires a determination based on articulable facts, not just a belief or suspicion.

2. A basis for discharge exists if;

a. The member has engaged in a homosexual act.

b. The member has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts; or

c. The member has married or attempted to marry a person of the same sex.

3. Credible information does not exist, for example, when:

a. The individual is suspected of engaging in homosexual conduct, but there is no credible information, as described, to support that suspicion; or

b. The only information is the opinions of others that a member is homosexual; or

c. The inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation; or

d. The only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes. Such activity, in and of itself, does not provide evidence of homosexual conduct.

4. Credible information exists, for example, when:

a. A reliable person states that he or she observed or heard a Service member engaging in homosexual acts, or saying that he or she is a homosexual or bisexual or is married to a member of the same sex; or

b. A reliable person states that he or she heard, observed, or discovered a member make a spoken or written statement that a reasonable person would believe was intended to convey the fact that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts; or

c. A reliable person states that he or she observed behavior that amounts to a non-verbal statement by a member that he or she is a homosexual or bisexual; i.e., behavior that a reasonable person would believe was intended to convey the statement that the member engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.

[8-3]

E. PROCEDURES

1. Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent disciplinary action or trial by courts-martial when appropriate.

2. Commanders shall exercise sound discretion regarding when credible information exists. They shall examine the information and decide whether an inquiry is warranted or whether no action should be taken.

3. Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, whether a member is a heterosexual, a homosexual, or a bisexual. However, upon receipt of credible information of homosexual conduct (as described in section C., above) commanders or appointed inquiry officials may ask members if they engaged in such conduct. But the member should first be advised of the DoD policy on homosexual conduct (and rights under Article 31, UCMJ, if applicable). Should the member choose not to discuss the matter further, the commander should consider other available information. Nothing in this provision precludes questioning a member about any information provided by the member in the course of the fact-finding inquiry or any related proceeding, nor does it provide the member with any basis for challenging the validity of any proceeding or the use of any evidence, including a statement by the member, in any proceeding.

4. At any given point in the inquiry, the commander or appointed inquiry official must be able clearly and specifically to explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.

5. A statement by a Service member that he or she is a homosexual or bisexual creates a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The Service member shall be given the opportunity to present evidence demonstrating that he or she does not engage in, attempt to engage in, or have a propensity or intent to engage in homosexual acts.

6. The Service member bears the burden of proving, by a preponderance of the evidence, that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

F. LEGAL EFFECT

The procedures in this enclosure create no substantive or procedural rights.

APPENDIX I

JUDGE ZILLY

1996

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

IN SEATTLE

LIEUTENANT RICHARD P. WATSON, Plaintiff,

V.

WILLIAM J. PERRY, Secretary of Defense, JOHN E. DALTON, Secretary of the Navy, UNITED STATES OF AMERICA,

Defendants.
No. C95-1141Z

DECLARATION OF DOUGLAS G. CHAPMAN AND PLAINTIFF'S SUMMARY OF BOARD TRANSCRIPTS

I, Douglas G. Chapman III, declare:

1. I am an attorney and partner in Bakes & Chapman, attorneys for plaintiff, Lt. Richard P. Watson. I have personal knowledge of the facts stated herein and, if called as a witness, could testify competently thereto.

2. The attached seven exhibits are true and correct copies of the administrative board records produced by Mark T. Quinlivan, counsel for the defendants in this action, as representing the records of the Board of Inquiry proceedings in "statements" cases under 10 U.S.C. section 654(b) (2) in which the servicemembers have successfully rebutted the statutory presumption regarding homosexual acts or propensity. Counsel for defendants have added the numbering to the exhibits.

2. Preceding the tabbed exhibits are summaries of the Board proceedings drafted by counsel for plaintiff.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: November 2, 1995 /S/
Douglas G. Chapman III

TABLE OF ATTACHMENTS

TRANSCRIPT SUMMARIES

EXHIBIT 1:	JANUARY 6, 1994 (NAVY, ENLISTED, MALE)	1
EXHIBIT 2:	JUNE 22, 1994 (NAVY, OFFICER, FEMALE)	3
EXHIBIT 3:	SEPTEMBER 21, 1994 (NAVY, ENLISTED, MALE)	4
EXHIBIT 4:	NOVEMBER 29, 1994 (NAVY, OFFICER, FEMALE)	6
EXHIBIT 5:	JANUARY 31, 1995 (AIR FORCE, OFFICER, MALE)	7
EXHIBIT 6:	APRIL 13, 1995 (NAVY, OFFICER, MALE)	9
EXHIBIT 7:	JULY 7, 1995 (AIR FORCE, ENLISTED, MALE)	12

EXHIBITS (TRANSCRIPTS)

		Exh. #/Stamp
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SUMMARIES

EXHIBIT 1: JANUARY 6, 1994 (NAVY ENLISTED, MALE)

This is a mixed conduct/statement case.

This case involves two proceedings. In the first board, the servicemember rebutted the presumption that he had the propensity to engage in conduct in the future, but the panel voted to discharge him, because he had failed to persuade them that he had not engaged in conduct in the past (not the issue). Later, a second board was convened. It voted to retain him. By that time, however, the servicemember stated that the ordeal overwhelmed him, that the vote to discharge him had profoundly affected his thinking about remaining in the Navy, and that the new vote was too late to change his thinking on the point. He was discharged. (Despite this record and result, defendants have identified this as one of the seven cases where the presumption was rebutted.)

The servicemember had confidentially approached the ship's drug counselor and admitted his homosexuality in the course of a session where he first revealed a severe alcohol problem.

First Board:

- The Recorder in the first proceeding (the "prosecutor") represented to the Board that "[t]he law of the land does not come from the Supreme Court or the Second District Courts of these Federal Judges. It comes from Congress." (17)

- The Recorder called as his first witness the counselor to whom the servicemember had confessed his homosexuality. The counselor noted that immaturity in the junior

enlisted ranks of his current ship explained why the confessed homosexual should be given a second chance onboard another ship, "where the don't ask/don't tell policy is in effect." (34)

- The enlisted witnesses from the member's division onboard the ship were uniformly supportive of the member due to his work, each saying that his orientation was irrelevant. All 29 enlisted colleagues of the servicemember (all E-6 and below) supported his return (40); the member's chief petty officer (E-7 or above) stated that sexual preference is irrelevant in the Navy today, that sailors simply don't care about anything except whether a colleague performs his or her job well (42).

- In rebuttal, the Recorder called witnesses not interviewed by the member's attorney. None of them knew the member; all were solicited by the

Recorder in the enlisted mess decks and interviewed immediately prior to testifying. One stated that while he had no objection to homosexuals serving, junior personnel might. He stated that as a junior enlisted man 10 years prior, he would have gone down and "hunted down" a known homosexual just to provoke a fight, something he said he would not do now since he's maturer. (53-55) The third witness advocated a policy of "zero tolerance" for gays. (56-57)

- The Board's finding on the "form" was as follows: Based on the preponderance of the evidence for each allegation, the Board found, by a vote of 3 to 0, the servicemember had committed homosexuality as evidenced by his statement that he is a homosexual. By a vote of 2 to 1 the boardfound that the servicemember had not committed homosexuality by engaging in, attempting to engage in, or soliciting another to engage in a homosexual act or acts. The Board's recommendation, by a vote of 3 to 0, was separation.

Second Board:

- At the second board, the Recorder (a commissioned officer) was more reasonable, and agreed that the prior board was tainted by the former Recorder's last-minute solicitation of anti-gay witnesses. Transcript II, p.11. The board was over in just over two hours. The member did not testify, but spoke through counsel, and made an appeal to fairness, saying he wanted to remain in the Navy, was committed to the Navy, and would not do anything to jeopardize his career. Few witnesses were called by the member, and the Recorder relied on a paper case (exhibits from the counseling session) . Despite this brevity, the board voted to retain him (3 to 0), despite finding that had had engaged in homosexual conduct
- By this time, however, the member had had enough. By memo dated 6 June 1994, he wrote:

This entire experience has been very traumatic. I had only just begun to finally work in my rate when I was removed from the ship in November [1993]. I have been working at [***] doing odd jobs for the past seven months. I was trained as a nuclear field mechanic but have been working painting and cleaning barracks since I was removed from ***]. My last fitness report from the ship, while it was a very good one, makes specific mention of my sexual orientation. In order to attempt to ensure a trouble free tour at my next command, I know I need to have that evaluation removed or at least the specific mention of my being gay redacted. It has come to my attention, however, that it will take several months, maybe even a year, or that removal to take place, if it takes place at all.

While I have wanted nothing more than to stay in the Navy, asI have had time to reflect on these circumstances, I feel I simply cannot do so. Therefore, despite the recommendation of my most recent administrative board, I ask to be discharged.

EXHIBIT 2: JUNE 22, 1994 (NAVY, OFFICER, FEMALE)

This member was brought before a Board of Inquiry on the basis of her statement, made on September 14, 1993: "I do admit my homosexuality, although I have not participated in any homosexual conduct while a member of the armed forces."

At her Board, the respondent submitted a "statement of intent" that says, in its entirety: "I fully understand and intend to follow all Navy rules and regulations. More specifically, I fully understand and intend to follow the rules and regulations prohibiting homosexual conduct."

This respondent did call several witnesses who testified that she follows Navy regulations in general. For example, one witness testified that: "I would have no reason to believe that she would disobey any rules or regulations of the Navy that prohibit homosexual conduct."

Her former commander, on the other hand, gave more precise testimony about her ability to follow regulations in the particular context of DoD regulations on homosexual conduct. However, this witness has virtually no foundation for his testimony, since he also testified that he didn't know she was gay until he was told that by the Board of Inquiry:

> I have no reason to believe that she will disobey any navy regulations or that she would participate in any homosexual conduct. ... She did not tell me she was gay. I came to that conclusion after speaking with [the Board of Inquiry].

In fact, another witness that testified about the respondent's ability to refrain from conduct ("I have not seen anything to indicate to me that she has the propensity to engage in homosexual conduct. I feel she will obey all Navy rules and regulations") also testified that the respondent's statement was made only to get out of the Navy and that the witness did not even believe the respondent is gay.

Finally, the respondent submitted twelve character references, which appear to utilize a preprinted questionnaire format prepared by the Navy. The questionnaire does not ask anything about sexual conduct; it simply asks for generic information about military bearing, leadership abilities, reliability, and

willingness to work with the respondent in the future, and asks for a recommendation of separation or discharge. As a result, it is clear the proceeding is not about conduct at all, but simply puts the respondent to a "mob vote" or a "heckler's veto" that, in this case, turned out in favor of the respondent. In other words, the reasons for retention have nothing to do with conduct. Rather, the people who filled out the questionnaire make statements such as: "I don't see any reason to separate (her]" and "she is one of the sweetest people I know." In fact, some of the responses vote for retention despite the fact that they are clearly aware of her sexual orientation and make no effort to address the question of conduct: "I believe that [she] should be judged on her merits rather than her sexual preference."

EXHIBIT 3: SEPTEMBER 21, 1994 (NAVY, ENLISTED, MALE)

Separation proceedings were apparently commenced after the respondent confided in someone (not clear from the transcript) that he was having personal problems and told the individual that he was homosexual.

By a vote of 3-0, the board recommended that the individual be retained. The Board found that he successfully rebutted the presumption and that he had not engaged in homosexual conduct. Specifically, the Board found that he had admitted to a homosexual act (in high school) but that the acts was a departure from the respondent's usual behavior and was not likely to recur, and that the respondent's continued presence in the Navy is consistent with the interest of the Navy in proper discipline, good order, and morale.

The respondent essentially denied all sexual identity, indicated confusion about his sexuality, and made a vow of abstinence. Here are excerpts from his testimony:

- I do not engage in homosexual conduct with my co-workers or anyone else. When I came in the Navy I sore [sic] I would not engage in homosexual conduct due to catching a disease.
- I'm kind of confused about my sexual preference. I am not engaged in any type of sexual activity at this time with anyone. I made the choice to come back on active duty to serve my time and not engage in any type of sexual activity.
- I am homosexual. I suppose homosexual is someone attractive [sic] to the same sex. I have feelings toward men and women. I have no desire to have sex or relationship with a man or woman. I have a physical

attraction toward someone. I have no sexual attraction toward anyone. I have physical attraction toward women also.

- I don't see me having sexual attractions toward no one.
- I told [redacted] my preference because I thought I should let him know. I thought our conversation was confidential.
- I don't think in open bay barracks I would think about someone being attractive.
- The Navy's definition of homosexual does not fit me. My definition is my physical attraction. I do not pursue males or females. I have no sexual tendency to male but to females I do.
- I will not act on homosexual feelings. I do not engage or plan to engage in homosexual acts. I am a self-proclaimed homosexual.

Evidence included letters of reference from fellow sailors, including these comments:

- "The Navy should spend more of its time dealing with the people who know nothing about respect, loyalty and hard work... Kicking someone out for something so trivial as sexual preference is down right prejudicial... Lets move on to bigger problems facing us."
- "A person's sexual preference has little bearing on an individual job to be done and a person's private life is of no concern unless there is an impact on unit mission or readiness ... Gay men and women can and do serve in the military without problems. The problems occur when closed minded prejudices and fears arise in others."

EXHIBIT 4: NOVEMBER 29, 1994 (NAVY, OFFICER, FEMALE)

The respondent made the statement "I am lesbian." Her Board concluded that she had rebutted the presumption and voted to retain her.

Since this respondent did not in fact rebut the presumption, the Board's finding that she did shows that the Board's decision in the member's favor is not really a factual finding, but rather the Board's statement, conforming to the pro forma language of the decision form, that it wishes to retain the member.

The evidence presented did not approach the level of evidence required by the policy to rebut the presumption. There respondent offered only two types of evidence: first, statistical evidence that homosexuals are no more likely to engage in sexual conduct than heterosexuals, and second, the respondent's

statement "So I decided to come forward and say who I am. And when I made that statement that I am a lesbian, that statement was to indicate my sexual orientation. It, in no way, was meant to imply any propensity or intent or desire to engage in prohibited conduct." (724) (The policy and legislative history make clear that such testimony is not sufficient to rebut the presumption.)

EXHIBIT 5: JANUARY 31, 1995 (AIR FORCE, OFFICER, MALE)

This is a mixed conduct/statement case. The respondent admitted that he was a homosexual, but presented testimony that he did not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts while a member of the United States Air Force. Witnesses testified in support of his good conduct, character and credibility.

The government's case consisted of four witnesses who testified that the respondent stated to them that he was gay and three photographs of the respondent with another man: one with the other man holding the respondent, one showing the two of them kissing on the lips, and one showing the other man standing outside, naked, shaving himself. Government's counsel argued that the picture showing the two men kissing depicted the respondent "engaging in a homosexual act" and that the mere fact that the respondent had retained the pictures was evidence of his propensity. There was no other evidence of homosexual acts during respondent's time in the Air Force.

The respondent (through counsel) did not refute his homosexuality, but challenged whether he made the statements voluntarily or was set up by his roommate. Counsel stated that pictures were from respondent's past. Respondent called a chaplain with whom respondent had received counseling, who testified to his belief that the respondent would not act on his homosexuality because of his moral convictions (apparently contradicting at least one of the photographs, whatever their vintage). Two witnesses testified to respondent's good character and credibility; each stated he had no idea that respondent was gay even though they were close friends. Respondent made an unsworn statement admitting his homosexuality but stating that he had no desire to engage in homosexual activity while in the military.

Excerpts of transcript:

- "I felt like I was framed. I felt like I was set up. It just seemed so obvious that it was - it was a set up but I couldn't prove it, I didn't know how I would prove it. And then, you know, I was in awe, you know, I was scared."

- Q: "Do you believe that you will not commit any homosexual acts during your time in the United States Air Force?" A: "To the best of my ability, I believe that fully, especially with God in my life, I believe that fully."
- "He has committed no homosexual acts while he's been in the United States Air Force and he has no intention of doing so." (From respondent's opening argument.)
- "Your orientation doesn't mean that you want to do that in the future. You're a whole person. He's a whole person. He has a mind of intellect, he has reasoning, he has values, he has morals. Just like a straight person has. He has goals." . "He has committed no sexual acts while on active duty in the United States Air Force." (From respondent's closing argument.)

The Board concluded that respondent made two statements ("I am gay" and "Oh, no, I'm gay") , and that he demonstrated that he is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

EXHIBIT 6: APRIL 13, 1995 (NAVY, OFFICER, MALE)

This was apparently tne only split decision of the seven "successful-rebuttal" cases identified by defendants (and the one with probably the strongest rebuttal by the respondent)

In this Board, the statutory purpose of the proceeding evaluating the respondent s propensity for future hcmosexual acts - was of virtually no interest to the Board members. Instead, the proceeding was a wide-ranging trial of the respondent's fitness to serve. The prosecutor (Recorder) offered no proof of sexual conduct or propensity, but attempted to argue that the prohibited propensity existed based on non-sexual character evidence.

The respondent (processed for his statement that he was bisexual) presented overwhelming, undisputed evidence that he did not have a propensity to engage in homosexual acts, and although the Board concluded (by a 2-1 vote) that he had rebutted the presumption, the examination of the witness, by both the Recorder and the Board members, was a wide-ranging inquiry into the servicemember's fitness (unrelated to any propensity for sexual misconduct) and his motivation for making his orientation statement.

The theory developed, through the blunt statements of one Board member and in the closing argument of the Recorder, that the servicemember made his statement simply for the purpose of getting out of a difficult assignment (as a shipboard department head).[1]

The respondent rebutted the presumption convincingly through the poignant and eloquent testimony of himself and his wife of 41/2 years. His wife testified first. She said "from that [her husband's revelation of his orientation earlier in their marriage] we have been able to build a really good honest marriage, ..." (1064-65) Though initially concerned, she said "I realized that look, he picked me. He chose me. 1 m not a guy. I'm a woman. We have a good sexual relationship. We had up until that point, and we just continued to get better." (1065) When asked "[i]s there any doubt in your mind that [your husband] won't be faithful to you as the [sic; as long as the] two of you are married?" she responded, "No doubt. No doubts at all. No." (1066) She testified that she had even reversed the tubal ligation she had had after her first marriage because, when she met the respondent, she said she "realized there is future family here" (1068); she had the ligation reversed a year after their marriage (1067)

The respondent echoed his wife's strong feelings about their marriage, commitment and fidelity. He said he had never been unfaithful to her (which meant no extramarital sexual conduct of any kind in the preceding 41/2 years) and would never be unfaithful to her. (1081) He said, "I find the relationship that I have with [my wife] is the most important thing in my life, and I would never do anything to damage that." (1081) "I know how devoted I am to my wife sitting out there. I know that I have no intention of ever having sex with anyone but her so lona as the both of us shall live " (1099)

Only one Board member questioned the respondent about the possibility of future homosexual acts. This member conducted a short examination, asking the respondent, "[S]uppose your wife died next week ... What's to preclude you from having a male partner at that point in time?" (1100) The respondent answered, "I want to raise children. I want to be a parent. I'm not going to get that if I go with a guy. ... I believe in monogamy. I believe in a stable family life. Those are things that aren't going to change, even if I did

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[1] Under the express terms of the statute, such a motivation would actually overcome the propensity presumption, not support it; Congress provided an exception for discharge where it appears the servicemember's purpose in making the statement was to avoid service. See 10 U.S.C. § 654(e). Yet the suspicious Board member and the government attorney used that assumed motivation for its exactly-opposite purpose: to question the servicemember's integrity and, therefore, to challenge his testimony that he would not engage in homosexual conduct.

lose my wife. I still will desire to be a parent, and for that reason, I will seek out another woman." (1100)

Against this testimony from the respondent and his wife, there was no evidence offered by the government of homosexual conduct[2] or of a propensity to engage in homosexual conduct.

Nevertheless, one of the Board members dissented from the Board decision in favor of the respondent by stating: "This officer's credibility makes me question his statement, he will not engage in relationships with other men outside his current marriage to his wife." During the entire proceeding, however, that member asked nothing about the respondent's propensity for homosexual acts.[3] This member asked only one question about sexual conduct, and that was about past, not future conduct (to which the respondent invoked his Article 31 right to remain silent) (1094) This member's sole interest was in the respondent's motivation for revealing his orientation, about which the member was openly suspicious: "You felt that you were not doing a good job and you saw this as perhaps a way to get out of that particular situation" (1091) ; later, questioning the respondent's explanation that he chose the day of arrival in port for making the statement to his CO because the CO would then have access to onshore personnel about the necessary procedures: "What I think you're saying here is, that the time was right for you to depart the ship" (1102).

The Senior Member also questioned the respondent on areas having nothing to do with the propensity issue. He probed the respondent's purpose for making the statement, wondering what role the new policy played in the respondent's decision (1094) and wondering how the respondent would deal with questions about his sexuality in the future (1094-95); he put a similar line of questions to the respondent's wife (1069-71). The Senior Member expressed his doubt that the respondent could avoid questions about his sexual orientation (1095-96) (though the issue was avoiding sexual acts).

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[2] The respondent admitted to homosexual conduct prior to his military service (i.e., at least 11-1/2 years earlier); there was no evidence of homosexual conduct during his military service.

[3] The transcripts are redacted to conceal all persons' identities, including the Board memoers. Defendants' counsel, Mark T. Quinlivan, provided identifying information sufficient to determine which of the Board members in this proceeding was the dissenter.

The Recorder, who also asked the respondent nothing about propensity for future conduct, built his propensity argument on non-sex-related character issues. He:

- argued that the timing of the respondent's statement showed that the respondent made the statement in order to get out of a difficult assignment (1082-84) , which showed lack of integrity, which, in turn, impeached the credibility of respondent's testimony that he would never engage in homosexual conduct.
- argued that the respondent had lied about his orientation for 11-1/2 years under the old policy (which required automatic discharge of all homosexuals) (1106) (a tack that would automatically impeach every homosexual servicemember whose service predates the new policy).
- attacked respondent's "discipline" based on his talking to people about his orientation: "He couldn't keep his mouth shut. [T]hat goes to his character. That goes to whether he's going to be able to withhold from sexual acts, whether he's going to be able to withhold from other previous statements--or other statements in the future. That's a matter of discipline." (1107)

Thus, after overwhelming evidence rebutting the presumption and no evidence of propensity, two Board members agreed that respondent had rebutted the presumption, but the third, whose only interest was in a factor that 1) had nothing to do with sexual conduct, past or future, and 2) could actually have exempted the respondent from discharge, relied on that factor to conclude that the respondent had not rebutted the presumption.

EXHIBIT 7: JULY 7, 1995 (AIR FORCE, ENLISTED, MALE)

This respondent was brought before a Board of Inquiry on the basis of the statement: "I have now made the difficult decision to openly declare that I am a homosexual."

During his Board of Inquiry, respondent presented an affidavit from research psychologist Dr. Gregory Herek that testified that homosexual orientation does not equate with future sexual behavior. Dr. Herek's affidavit, however, is in no way whatsoever specific to this respondent, but speaks in general terms.

The witness also submitted character references from five witnesses. Not one of his witnesses says anything about whether or not this respondent will or will not commit homosexual acts or whether he has a propensity to commit homosexual acts. Rather, they simply testified that he is well-liked:

> He took upon himself an immense amount of responsibility and executed it with nothing short of professionalism

In fact, some witnesses were completely unaware that respondent was facing discharge for homosexuality:

> I understand that [respondent] is being processed for discharge from the United States Air Force. I have not talked to him or the Commander to learn of the reason. I don't know nor care to know. What I do know is that [respondent] possesses all the qualities the Air Force needs in its young airmen. .. . Superb actions and attitude derived from an inner desire to do the best job possible.

Moreover, among those witnesses that did know the basis discharge, certain witnesses explicitly advocated overriding basis for discharge because the respondent was so well-liked so capable, not because he rebutted any presumptions:

> I recommend careful consideration and leniency because of his enthusiastic attitude toward the Air Force and excellent duty performance.

Finally, the respondent submitted a statement from his mother that, while testifying to his good character, does not address conduct at all.

The respondent also submitted his regular performance reviews and certificates of completion of courses and various commendations as well as other pre-statement letters of recommendation. Obviously, none of these made any reference to his homosexuality or his propensity to engage in conduct.

Thus, it is clear that this particular respondent presented no evidence whatsoever that he would or would not engage in proscribed conduct in the future.

APPENDIX J

S. Hrg. 103-845
POLICY CONCERNING HOMOSEXUALITY
IN THE ARMED FORCES

HEARINGS
BEFORE THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

MARCH 29, 31; APRIL 29; MAY 7, 10, 11; JULY 20, 21, 22, 1993

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ation and we are not going to prevent someone from serving because of their race.

The same thing, I think, is true with religion. The same thing now is true with gender and the question is whether we are now going to do that relative to sexual orientation.

And I am reminded in this regard of-and I think it is fair here to quote the reaction of some of the military leaders when it was proposed that it integrate racially, the services.

The Secretary of the Navy said, in December of 1941—and this goes directly to the cohesion question, putting aside the source—"the close and intimate conditions of life aboard ship, the necessity for the highest possible degree or unity and esprit de corps, the requirement of morale, all these demand that nothing be done which may adversely affect the situation. Past experience has shown irrefutably that the enlistment of Negroes other than for mess attendance leads to disruptive and undermining conditions."

Now, that is what was said by the Secretary of the Navy in 1941. And finally the President of the united States said, whether it does or does not, you

are going to live with it, that may affect unit cohesion or not in the short term. We, as a country, are not going to allow that to dissuade us from our course.

That was a decision that was made by the Commander in Chief. And in that regard, it is relevant to look at arguments which were made relative to race. Unless there is a rational basis, unless there is a rational basis here for the antipathy among our troops to homosexuals, and that becomes the issue. Is that a rationale basis or not?

Now, all of you say, as I understand it, that you would allow homosexuals to serve if they keep it to themselves. Is that fair, Dr. Marlowe?

Dr. Marlowe. Yes it is.

Senator Levin. Dr. Korb, do you say that and Dr. Henderson, you say that?

To put it another way, the current ban on homosexuals serving you would modify to read that only homosexuals who acknowledged their homosexuality should be banned. Is that accurate, Dr. Marlowe?

Dr. Marlowe. Publicly presented within the military context. Senator Levin. I want to ask you because your position is different. Dr. Henderson, is that your position?

Dr. Henderson. You know, by the use of the word acknowledge, you are implying that somebody is going to ask them about it and they are going to say, yes. Well, I do not agree with that.

Senator Levin. Okay. You would use the word state?

Dr. Henderson. I would say that if a homosexual comes in and asserts, in a very public manner, that he is homosexual and that is his lifestyle and that is what he is going to be, then that is the problem.

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carrier that could accept such an airplane and employ successfully. We do not have the time to do that. There are too few handicapped people to send that much money and to spend that much time on designing such a weapon.

We just do not have the time for this. We have more important things to do, and it is just not the best thing for the military.

Another thing I would like to add is military service is not a right, it is a privilege. You earn that privilege by being able to form as a team member, to be able to bring something to that team that makes you a worthwhile member, and that is the bottom line. Thank you.

Chairman Nunn. Thank you, Lieutenant Frey. Commander Pledger?

STATEMENT OF COMDR. JAMES PLEDGER, U.S. NAVY

COMMANDER PLEDGER. Good afternoon, Senator Nunn and distinguished Senators of the Senate Armed Services Committee. I am Commander James E. Pledger, commanding officer of U.S.S. Arthur W. Radford, a Spruance class destroyer.

I left my home in Mississippi in 1968 to begin my Naval career at the U.S. Naval Academy. Since my graduation in 1972, I have served in destroyer and frigate type ships and have had several short tours in Washington, D.C. I am married and have three children ages 3 through 15.

I have been commanding officer of Radford since December 1991. During my tour, Radford has completed a 6-month deployment to the Arabian Gulf, a 4-month shipyard availability, and a 2-month deployment to the Caribbean for counter-narcotic operations and I will return to the Caribbean for more counter-narcotics operations later this month.

The Radford has a crew of approximately 350 enlisted men and 25 officers. During our Arabian Gulf deployment we carried approximately 405 personnel, including a destroyer squadron staff and an embarked helicopter detachment. This required more than the available number of bunks on Radford and therefore meant that 5 to 10 personnel had to sleep on temporary cots.

Enlisted personnel on the Radford bunk in 6 open bay berthing compartments of approximately 55 men each, and one with approximately 20 bunks. The bunks are stacked three high. Our berthing compartments have two to four showers each. Officers generally live three men to a state room. There is 1 sanitary and shower facilities for the 25 chief petty officers. As you can see, there is little, if any, opportunity for privacy aboard my ship.

As would be expected, the possibility of repealing the restriction on homosexuals in the military has been a hot topic of conversation and concern aboard the Radford. I have discussed this issue with most members of my crew, generally in small groups, to try to assess their attitudes and concerns. My crew has overwhelmingly opposed a repeal of the restriction. In fact, I have never witnessed such an emotional response to any issue in my 21 years of active duty.

In an admittedly unscientific poll, my crew is approximately 98 percent opposed to lifting the ban. When asked as to their primary

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The price fro repeal will be high. From one in the trenches, I can only ask that my government listen to those in uniform and isolate the political aspect on this issue.

This is the most emotional issue I have witnessed in my 21 years of active duty. And I believe that lifting the homosexual ban will result in serious detrimental consequences affecting good order and discipline, and ultimately the readiness of the United States Navy.

Thank you for this rare opportunity to speak on this issue today.

Chairman Nunn. Thank you, Commander Pledger. Commander Hutton?

STATEMENT OF COMDR. LIN HUTTON, U.S. NAVY

Commander Hutton. Yes, sir, Senator Nunn. Thank you very much for the opportunity.

I have been in the united States Navy for 17 years. I have seen extraordinary change, obviously, as a woman and a Naval aviator. I am currently the commanding officer of an aviation squadron who fly aircraft to and from aircraft carriers at sea. I have about 400 young men and women, fine outstanding Americans, who work for me. I currently have a detachment that is deployed with the U.S.S. Theodore Roosevelt in the Adriatic right now.

And to be honest with you, I am a little concerned at the entire event. I look at the resources sitting in front of me, our Senators and your staff's and your talent and ability, and I am really concerned because from everything we can see, 90 to 98 percent of our population is heterosexual.

Now, the homosexual lifestyle is an anathema to the majority of those Americans that are out there, and I am concerned that we are allowing ourselves to get diverted and valuable resources like yourself and your time and energy into dealing with this.

Senator Thurmond. Would you mind speaking in your microphone so people in the back can hear you?

Commander Hutton. Yes, sir. I am just concerned that so many of your efforts are being generated into something so small, a small segment of our society, when we ought to be looking at economy and jobs, medical issues, and these are a common goal we need to be setting for the common good.

You know, 90 to 98 percent of the Americans in this country are heterosexual, and even in the gay community these issues of jobs and economy, medical and so forth, environment, those are over-riding concerns for them as well.

And so here we are spending all this time looking at the military. And to be honest with you, I feel like we are looking at a small percentage that is very vocal, very active, and very articulate. And they are trying to use the government to legitimize their lifestyle.

[Applause.]

Chairman Nunn. Again, let me urge you. Please, let us not have this please because we are going to have a lot of witnesses testify. You are going to agree with some of them. You are going to disagree with some. And in courtesy to everyone, let us just be restrained.

Commander, go ahead. We did not want to cut you off. Are you finished?

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I do not think there is any physical or mental or any other difference in their capabilities compared with the heterosexual. But as we have been talking about all day, it is the attitudes of the majority of the heterosexuals and their reactions to this type of behavior or orientation which begets behavior. Once it becomes known, it creates the problem that we would face.

So I would have to explain to them using the same points we have been making today as to why it would be inconsistent for them to remain in the service.

Senator Kempthorne. Thank you.

Commander Hutton.

Commander Hutton. Yes, sir, I think it is a real tragedy that, I guess in one point, to say they came out of the closet. They served with distinction and they could have continued to serve wonderfully and well. But the problem comes down to-and I think it was Senator Cohen's point-is there a ration basis for discrimination? It comes down to respect and trust. The very ties that bind unit cohesion and group is respect and trust. It is the key.

And what those individuals have done is betrayed a trust, and they have betrayed that level of respect that their peers had for them by acknowledging their sexual orientation. Had they not said anything, they certainly would have continued on and had all that trust and respect they would have had prior to that. But, by opening themselves out like that, they have eliminated and they have broken the bond with the rest of the group. And the rest of the group will just not trust them and they will not respect them.

Senator Kempthorne. Thank you. Captain Holder.

Captain Holder. I would compare it to a contagious disease or a person who is injured. We do not let sailors walk around ship with casts on their

arms because of the safety of the situation. In the case of a homosexual person who suddenly declares themself homosexual, I would ask what is the motive. Why are you trying to do this? What has changed that you now have to declare this position?

You have gone now to possible-is it possible that you are seeking a power move here to gain an advantage or to cause a divisiveness in the cohesion that we have worked very hard and that we need in order to effectively do our jobs?

Senator Kempthorne. All right. Thank you very much.

I think we have asked you some very difficult questions and some philosophical questions, and I think all of you are to be commended.

Thank you, Mr. Chairman.

Chairman Nunn. Thank you, Senator Kempthorne.

I want to thank all of you for being here and for helping us today and enlightening our committee. We appreciate your testimony, but most of all we appreciate your service.

Thank you very much.

Our next panel: Lt. J.G. Richard Dirk Selland and Lt. J.G. Tracy W. Thorne.

The committee will come to order. Please, let us have quiet so we can be heard.

I want to caution the audience again now that we will not-whether you agree or do not agree with what the witness may say,

some of the concerns I have, I have to try and ask them lawyer-like questions, so please bear with me.

I must say that I am very much concerned, I tell our witnesses today and tell my fellow members of this committee. I am very fearful that maybe the policy that has been outlined thus far, upon which lots of good questions were asked yesterday and followed up by questions by Chairman Nunn and Senator Thurmond this morning-that the bottom line is that I am fearful that we must be careful not to write a policy that we think is a good one, a compromise if you will, which I have been seeking for a long, long time, but then end up in a situation where, after we have tried to do something to reach a compromise, the courts say no.

I do not know what happens then. I am fearful that he courts might say no in such a fashion that we might end up with what I think would be an

unsatisfactory policy and that is a policy of open gays in the military, which a great number of us have some very serious legitimate concern about. So, let me just tell you my offhand layman's reaction to some of the things that I have hear, some of the things that I have read, that give me cause for concern.

I do not know how the court-and how do you think the court is going to interpret the presumption, as I understand it in the policy that has been advanced by the President and the Joint Chiefs, that somehow you can be a homosexual in the service as long as you never, ever before, now, or in the future intend or have committed any kind of a homosexual sexual act? I mean, is that not the basic tenet of your policy? And if so, is that not such a far fetched one that the courts are likely to say no, you cannot do that?

Ms. Gorelick. No, is my very clear answer to that. The courts have, in fact rejected the notion that a status-based policy is appropriate. I mean, the reason that we do not now discharge people because we believe them to have a homosexual orientation is because in 1981 it was recognized that if we did have a status-based as opposed to a conduct-based rule, that it would be vulnerable in the courts.

In 1981, the determination was made not to have as a basis for discharge that someone had, essentially, a homosexual orientation. It is taking that out of the policy and making it explicit that the policy is not orientation or status-based that makes the policy easier to defend. In fact, if you had a rule that required discharge based upon orientation alone, with no manifestation, that is what would cause the vulnerability.

So, I will say to you that, one, the discharge policy itself is essentially not changing. You heard that in my responses to Senator Nunn's questions. We are trying to make it clear. WE are tying to make sure people understand what it means. And two, the fundamental premise, legal premise, of this policy, because it makes that explicit, is stronger, not weaker.

Senator Exon. Let me get into your definition and your reaction to some of the changes that have been made. Under the new policy, as I understand it, a member of the armed services could openly participate in a gay parade, public parade, and not be considered to be having charges brought for dismissal. Is that correct?

Ms. Gorelick. That is correct. Let me say two things about that, if I might. Number one, to ensure that our policy is not vulnerable

APPENDIX K

Report to the Secretary of Defense

Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military

Office of the Under Secretary of Defense (Personnel and Readiness)
April 1998

INTRODUCTION

On February 28, 1994, after extensive hearings in Congress, the enactment of a federal statute, and coordination with Congressional Oversight Committees, the Department of Defense instituted its current policy on homosexual conduct in the military. As required by the federal statute (10 U.S.C. § 654), the DoD policy provides that engaging in homosexual conduct is grounds for discharge from the military. Congress expressly found that service by those who have a propensity to engage in homosexual conduct creates an unacceptable risk to morale, good order and discipline, and unit cohesion, and that the long-standing prohibition of homosexual conduct therefore continues to be necessary in the unique circumstances of military service.

The DoD policy also provides, however, that sexual orientation is a personal and private matter that is not a bar to military service unless manifested by homosexual conduct. It was the sense of Congress that applicants should not be asked about homosexuality as part of the processing of individuals for accession into the Armed Forces. Consequently, under the policy, applicants for military service may no longer be asked about their sexual orientation. Moreover, the services may not initiate investigations solely to determine a member's sexual orientation. Commanders may initiate an investigation only upon receipt of credible information that a service member has engaged in homosexual conduct, i.e., stated his or her homosexuality, committed a homosexual act, or entered into a homosexual marriage.

In April 1997, the Secretary of Defense tasked the Under Secretary of Defense for Personnel and Readiness to conduct a review of how well the Department's policies on homosexual conduct in the military are being applied and enforced. The Department of Defense periodically reviews many of its personnel policies. Since the homosexual conduct policy had been in place for three years, a review was appropriate. Part of the tasking was to review the

issues raised in a 1997 report by the Servicemembers Legal Defense Network and issues which members of Congress and others had brought to the Department's attention. The purpose of the review was to assure ourselves that we are doing all we can to ensure that our policy is faithfully executed.

The Under Secretary of Defense directed the Principal Deputy Assistant Secretary of Defense for Force Management Policy to head the review. A working group was formed consisting of legal and personnel representatives from each of the Military Services and from the Office of the Secretary of Defense. The working group met several times to evaluate the range of matters raised concerning application and enforcement of the Department's policy on homosexual conduct in the military.

Subsequently, senior representatives from each of the Services met with senior legal and personnel officials in the Office of the Secretary of Defense on several occasions to discuss policy implementation details. In addition, discussions were held on the Services' handling of individual incidents, their conduct of individual investigations and their processing of individual separation cases which were cited to the Department of Defense as possibly non-compliant with the Department's policy. The Services provided Office of the Secretary of Defense staff with selected case files, including commander directed investigations, records of administrative discharge hearings, and Inspector General investigations. Each such matter was carefully reviewed. New issues and cases brought to the attention of the Department between April 1997 and February 1998 were also reviewed.

The Defense Manpower Data Center was also tasked to provide various statistics about discharges based on homosexual conduct for Fiscal Years 1980 through 1997. The complete Fiscal Year 1997 statistics provided in this report were not available and verified by the Services until February 1998.

Proper implementation of the policy on homosexual conduct has been a high priority at the Department of Defense since the policy was instituted. The balance that the policy strikes between the prohibition of homosexual conduct in the military and the privacy rights of our service members has posed a challenge to the Services. Commanders must enforce the statutory ban on homosexual conduct while at the same time respecting the limits that the policy imposes on investigations of such conduct. Secretary Cohen has strongly stated that harassment or threats of violence against service members will not be tolerated; that fact finding inquiries into homosexual conduct may be initiated only when a commander has received credible information that there is a basis for discharge; that fact finding inquiries must be limited to the

factual circumstances directly relevant to specific credible information received; and that fact finding inquiries must not be unduly intrusive.

This report presents the major conclusions of the review as well as a discussion of many of the matters considered in reaching those conclusions. In order to protect the privacy of current and former service members, this report does not discuss individual cases by name.

SUMMARY OF FINDINGS

I. Data on Discharges for Homosexual Conduct

The review examined the available statistical data concerning homosexual conduct discharges and found that the number of service members discharged for homosexual conduct has in fact risen since the new policy became effective in 1994. We believe that this increase is cause for some concern, although it continues to be an extremely small percentage of the total force. The review did not provide a complete explanation for the increase, but several facts did emerge upon closer analysis of the discharge data.

First, we found that the large majority of the discharges for homosexual conduct are based on the statements of service members who identify themselves as homosexual, as opposed to cases involving homosexual acts. The Services believe that most of these statement cases -- although not all of them -- involve service members who voluntarily elected to disclose their sexual orientation to their peers, supervisors or commanders. The increase in the number of discharges for homosexual conduct since Fiscal Year 1994 is attributable to this increase in statement cases. Discharges for homosexual acts and marriages have declined by 20 percent over the past three years. Second, most of those discharged under the policy are junior personnel with very little time in the military, and most of the increase in discharges for homosexual conduct has occurred in this sector. The number of cases involving career service members is relatively small. Third, the great majority of discharges for homosexual conduct are uncontested and are processed administratively. Finally, more than 98 percent of all members discharged in Fiscal Year 1997 under the policy received honorable discharges, general discharges under honorable conditions or uncharacterized discharges. (Separations of enlisted members in their first 180 days of military service are generally uncharacterized.) Discharges under other than honorable conditions or courts-martial for consensual homosexual conduct are infrequent and have invariably involved aggravating circumstances or additional charges.

II. Application and Enforcement of the Homosexual Conduct Policy

As noted above, Department of Defense policy specifies that commanders may initiate investigations of suspected homosexual conduct only after receiving specific, credible information concerning the conduct of the service member in question. In the cases reviewed, we identified only isolated instances in which inquiries were made without the requisite factual basis, or in which the scope of an investigation was expanded in a way that was inconsistent either with the express terms of the policy or with its spirit. We concluded that concerns that there have been widespread "witch hunts" against suspected homosexuals and that there have been numerous other abuses in the course of investigations are unfounded, and Secretary Cohen has strongly emphasized that such abuses will not be tolerated.

Although we conclude that the Department's policy on homosexual conduct is generally being implemented properly, a number of areas were identified in which the policy could be usefully clarified or implementation could be otherwise enhanced. Steps have already been taken to address some of these issues. For example, last March, former Under Secretary of Defense Dorn issued a directive providing guidance on how threats against alleged homosexuals in the Armed Forces should be investigated. As explained below, this guidance made clear that the report of a threat should result in the prompt investigation of the threat itself, that investigators must not solicit allegations concerning the sexual orientation of the threatened member, and that the report of a threat alone is not credible information and is not a basis to initiate an investigation against the victim. The Department has also eliminated obsolete enlistment forms that could have resulted in improper questions by military recruiters.

III. Recommendations

We recommend that the Department take action in several areas to address other concerns that have been raised with the implementation of the policy. These areas include:

* the use of pretrial agreements, or "plea bargains," to obtain evidence of consensual homosexual conduct;

* the scope of investigations in "coming out" cases, including cases where recoupment of financial benefits is at issue;

* the importance of consultation with higher headquarters before initiating investigations into alleged homosexual conduct;

* the need to reissue and expand the directive guidance issued by former Under Secretary Dorn concerning threats against service members based on their alleged homosexuality; and

* the need to ensure that the training of those charged with enforcing the Department's homosexual conduct policy is effective.

We believe that these are areas in which clear guidance to the field will be of significant benefit in ensuring a fair and even-handed application of our policies.

DISCUSSION

I. Statistics on Homosexual Conduct Discharges

A. General Statistics

Statistics on homosexual conduct discharges both before and after the current policy was instituted were studied in detail. Table No. 1 sets out the total number of service members discharged for homosexual conduct in each year since 1980, and the percentage of the personnel strength of the Armed Forces that these numbers represent. Although the trend from the early 1980s to the early 1990s reflected gradually decreasing numbers and rates of discharges, culminating in a historic low in Fiscal Year 1994, both the number and rate of discharges for homosexual conduct have increased each year since that time. Whereas 597 service members were discharged for homosexual conduct in 1994, representing 0.037 percent of the total force, 997 members were discharged in Fiscal Year 1997, which represented 0.069 percent of the total force. While these numbers still remain much lower than the numbers prevalent in the early 1980s and represent a smaller percentage of the total military population than in the 1980s, the consistent upward trend from 1994 to 1997 raises questions about how our policy is working in practice.

Some of the increase in the number of individuals discharged for homosexual conduct, as compared to the pre-1993 numbers, is attributable to changes in counting methods instituted by the Air Force since the new policy was implemented. Under the former policy, Air Force recruits who answered "no" when asked if they were homosexual on the enlistment forms in use at that time, and then subsequently declared their homosexuality early in their service, were discharged for "fraudulent enlistment" rather than for homosexual conduct. Under the new policy, however, questions concerning homosexuality are no longer permissible and are no longer included on enlistment forms. Thus, Air Force members who during their first six months of military service, state that they are homosexual are now discharged on the basis of homosexual conduct, rather than on the basis of a "fraudulent

enlistment." This change in counting methods by the Air Force makes the post-1993 numbers higher than they would have been under the old system. This change, however, does not explain the increase in homosexual discharges that has occurred since 1993.

In an effort to gain a better understanding of this issue, we closely studied the available information concerning the nature of homosexual discharge cases last year. This review revealed that more than 80 percent of the discharges for homosexual conduct in Fiscal Year 1997 were "statement" cases, i.e., cases where the service member made a statement that he or she was homosexual, as opposed to homosexual act or marriage cases. (See Table No. 2.) The Services believe that a large majority of the "statements" cases involve service members who voluntarily identify themselves to their commanders, supervisors or peers as homosexual. Moreover, 58 percent of those discharged for homosexual conduct in 1997 were junior enlisted personnel with less than one year of military service. (See Table No. 3.) The early discharges occurred most frequently in the Air Force, where 212 of the 309 discharges for homosexual conduct occurred in basic training. Only 68 of the 309 discharges involved members who had completed their first year of service. Across all the Services, more than 80 percent of those discharged had less than four years of service. Finally, most of the increase in the number of service members discharged for homosexual conduct in recent years has occurred among service members who are discharged early in their first term of service.

Thus, in the most common case, a discharge under the homosexual conduct policy involves a junior enlisted member who makes a statement declaring his or her homosexuality to a commander, supervisor or peer relatively early in the member's first term of service. This is the type of discharge that has been increasing in recent years. Because extensive inquiries or investigations are not conducted in most of these cases, the reasons for this increase are not known and would be difficult to ascertain. It is possible that the number of discharges could have increased somewhat as a result of the fact that applicants are no longer asked about their sexual orientation when enlisting in the Armed Forces.

It bears mentioning that, notwithstanding the recent increases, the number of discharges for homosexual conduct is a very small percentage of total discharges. For example, in the first year of military service, where discharge for homosexual conduct is most frequent, such discharges represented only seven tenths of one percent of the total discharges of members in their first year of service in Fiscal Year 1997. Increasing involuntary discharge rates -- whether for homosexual conduct or for any other reason -- are a cause for

concern. We saw no evidence, however, that the increases that have occurred in separations based on homosexual conduct indicate that our policy is not being properly or fairly implemented.

B. Statistics on Women

The statistics on homosexual conduct discharges indicate that women have been discharged under the policy at rates that exceed their representation in the force. Women made up just over 13 percent of the military strength of the Services but accounted for 29 percent of homosexual conduct discharges in Fiscal Year 1996. In Fiscal Year 1997, the relative number of women discharged for homosexual conduct was down to 22 percent of the total, with the representation of women increasing to nearly 14 percent of the force.

The reasons for the gender disparity in homosexual conduct discharges are unknown. It has been argued that women are sometimes accused of being homosexual in retaliation for their reporting of sexual harassment or other misconduct, and therefore are discharged in greater numbers than men. In reviewing the complaints that were received last year, we found very few specific instances in which women were reportedly accused of being homosexual in retaliation for their reporting of sexual harassment or other misconduct, but could not substantiate any instance where a commander's investigation improperly targeted the victim of sexual harassment rather than the perpetrator.

Nonetheless, it is critical that military service women feel free to report sexual harassment or threats without fear of reprisal or inappropriate governmental response. As discussed below, we recommend that the Department reissue guidance to make clear that when sexual harassment is reported, the focus of the investigation must be on the harassment or threat.

II. Investigations of Homosexual Conduct

Although extensive investigations of homosexual conduct are the exception rather than the rule, there are a significant number of cases in which such investigations have been conducted. Based on the cases reviewed, we concluded that the vast majority of investigations that have occurred have been properly initiated, i.e., an investigation has been opened only after the commander had determined that there was credible information that the member had engaged in homosexual conduct.

We concluded that many of the criticisms made last year about improper initiation of investigations reflect a misunderstanding of the Department's policy. In practice, credible information has sometimes been provided to commanders in ways that service members might not have expected would

occur, or has been based on communications or behavior that the service member might have expected would remain private. For example, current or former partners, roommates, or unrelated third parties have sometimes come forward on their own to report information or evidence of homosexual conduct to commanders against the wishes of the service member in question. Photographs or written communications that evidence homosexual conduct have sometimes been revealed to civilians who then brought this evidence to the attention of a commander, without any inquiry having been conducted by the commander. Credible information has also been incidentally discovered in the course of proper, entirely unrelated criminal or disciplinary investigations of the member or of others. It is not a violation of Department policy for a commander to initiate an investigation when information has been reported in any of these circumstances, provided that the information received is credible. Indeed, because federal law requires that those who engage in homosexual conduct must be discharged from the military, commanders are obligated to investigate whenever they receive credible evidence of homosexual conduct.

We also concluded that, for the most part, the investigations that have been initiated have been conducted properly. Allegations of widespread abusive investigatory practices have not been substantiated.

However, in reviewing the cases referred to our attention, we concluded that three investigations did not fully comply with Department policy. In two of those cases investigators asked service members questions concerning their sexual orientation without credible information or without the requisite determination by a commander that credible information was present or an investigation against a service member was improperly expanded because investigators asked for the identities of others who may have engaged in homosexual conduct. In one of these cases, there was a failure to properly advise service members of their rights prior to being questioned. The recommendations set out below pertaining to consultation and to the training of investigators and others charged with implementing the homosexual conduct policy should help to preclude further errors of the type we noted.

We concluded, however, that the instances in which improper practices have been identified in homosexual conduct investigations were isolated occurrences. The few errors that were made were generally committed by investigators rather than by commanders. Still, such situations are unacceptable. The Services are committed to proper implementation of the policy and are working hard to ensure that both commanders and investigators understand and abide by the limits on homosexual conduct investigations.

The Military Service representatives on the working group indicated that it has become common practice for installation judge advocates to consult with more senior, more experienced judge advocates in higher headquarters legal offices for advice in those cases involving more complex issues or investigations. As noted, the Services reported that the vast majority of homosexual discharge cases involved no or minimal investigation. In many cases, where a service member had informed his or her commander or supervisor of his or her homosexuality, any ensuing investigation usually consisted of only limited questioning of the service member. As a result, installation-level attorneys have had little opportunity to build practical expertise in providing advice on more complex investigations related to the homosexual conduct policy. We recommend that the Department issue guidance clarifying that consultation with higher headquarters legal offices is recommended before initiating investigations into alleged homosexual conduct.

III. Threats Against Suspected Homosexuals

Perhaps the most troubling allegation addressed by the working group was reported threats against, or harassment of, suspected homosexuals in the military. Concerns have been expressed that suspected homosexuals in the Services have been harassed or threatened with violence by other service members and that service members have been reluctant to report such harassment or threats for fear that their commanders would launch investigations against them for homosexual conduct.

Of the cases we reviewed, we found four cases in which anti-gay threats or harassment directed towards specific individuals were reported by service members. We found that, in those cases in which service members complained to their commanders, the commanders promptly took appropriate actions in response to the reported threat or harassment and did not target the victim. In two cases the threats took the form of anonymous notes and investigators could not identify those who were responsible.

The Department has been concerned about the possibility that service members may sometimes not report anti-gay threats or harassment for fear of being targeted with an investigation. In March 1997, the Under Secretary of Defense for Personnel and Readiness issued directive guidance designed to make clear that service members must be able to report harassment or threats free from fear of harm, reprisal, or inappropriate or inadequate governmental response. The guidance provides that the report of harassment or a threat should result in the prompt investigation of the threat itself, and that investigators should not solicit allegations concerning the sexual orientation or

conduct of the threatened person. If, during the course of an investigation, information is received that the service member has engaged in homosexual conduct, commanders are directed to consider carefully the source of that information and the circumstances under which it was provided in assessing its credibility. The fact that a service member reports being threatened because he or she is alleged to be a homosexual shall not in itself constitute credible information justifying an investigation of that service member. During the course of the review, it was discovered that there were instances where the effective dissemination of the Under Secretary's directive guidance could not be documented. Also, the Under Secretary's directive does not expressly make clear that, in addition to threats, harassment of service members based on their alleged or presumed sexual orientation is unacceptable, and that service members who engage in such conduct will be held accountable. Since harassment or threats of violence against our service members will not be tolerated, we recommend that the memorandum be reissued by the Under Secretary and widely distributed to the field.

IV. Special Issues Concerning the Homosexual Conduct Policy

A. Selective Prosecution

It has been alleged that the Services have criminally prosecuted service members for consensual homosexual misconduct but have not prosecuted consensual heterosexual misconduct. We found no evidence to support this allegation.

The Department's policy is that administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent disciplinary action or trial by courts-martial, when appropriate. In accordance with this policy, the vast majority of homosexual conduct discharges have been processed administratively. Most cases have been uncontested and resulted in honorable discharges. According to the Services, the cases in which service members have been criminally prosecuted for homosexual conduct have involved aggravating circumstances such as fraternization, sex with minors or sex for compensation, lack of consent, or additional charges against the individual.

B. Pretrial Agreements

One issue that has arisen concerns the use of pretrial agreements to obtain information concerning homosexual conduct. In what is, to our knowledge, a unique case a service member who was being prosecuted for homosexual rape offered, in exchange for a limitation on his sentence, to provide the names of others in the Armed Forces with whom he had engaged in consensual

homosexual acts. The service member claimed to have information concerning an officer who had been engaging in homosexual acts with a number of young enlisted men under circumstances which also constituted fraternization. Both fraternization and the commission of the sexual acts are violations of the UCMJ. The convening authority accepted the offer of a pretrial agreement and obtained evidence concerning the officer as well as several others with whom the service member had engaged in homosexual acts. Investigations ensued, and the officer who had been identified resigned in lieu of facing a court-martial for fraternization and conduct unbecoming an officer. Other enlisted personnel were administratively discharged.

Complaints were made that this incident was a violation of the Department's policy limiting investigations of homosexual conduct. An inspector general investigation was conducted which concluded that no Department of Defense regulation or policy prohibited the convening authority from entering into a pretrial agreement and subsequently investigating those members who were alleged to have had engaged in homosexual acts.

Nonetheless, we concluded that agreeing to limit or reduce the sentence of a service member charged with serious criminal offenses in return for information concerning the consensual homosexual conduct of others is inappropriate in most cases. Pursuant to Department of Defense regulations, homosexual conduct cases are generally processed administratively and do not warrant criminal prosecution. Under our policy, we believe that it is generally inappropriate to agree to limit or reduce the sentence of a criminal defendant in order to obtain information that will not result in a court-martial. Moreover, Department of Defense regulations provide that criminal investigations of any type of adult private consensual sexual misconduct should be limited to the factual circumstances directly relevant to the specific allegations. Reducing a criminal sentence in order to obtain more allegations and thereby expand an investigation is inconsistent with the spirit of this policy.

For these reasons, we recommend that the Department issue additional guidance to make clear that pretrial agreements should generally not be used to obtain information on consensual sexual conduct. Our view is that such agreements should not be employed unless the conduct that the accused offers to report would warrant criminal prosecution. In determining whether to accept such an agreement, the convening authority should take into account the seriousness of the crime with which the accused has been charged.

C. Health Care Providers/Chaplains

Another matter we considered was the use of statements made by service members to military health care providers and chaplains. It has been alleged

that Department of Defense doctors, psychotherapists and chaplains are required to, and do, disclose confidential communications concerning homosexual conduct to commanders.

We found that none of the Services require health care professionals to report information provided by their patients unless, in the judgment of the health care professional, it is necessary to do so in order to protect the patient or to ensure the safety or security of military personnel or the accomplishment of the military mission. Moreover, Service representatives were able to identify only one case in which a military doctor may have, without the patient's consent, reported to a commander that one of his patients had stated that he was homosexual.

It is, however, important to bear in mind that there is a fundamental distinction between the physician/patient relationship in the military context and that in the civilian context. There is currently no physician-patient privilege for communications of any kind between service members and their military doctors because military doctors must remain free to report information on military necessity grounds. Of course, the lack of a privilege does not mean that doctors must report information provided by their patients (including information concerning homosexual statements or acts) to commanders, but that they may do so if they deem it appropriate under the circumstances. Also, we note that the Department has proposed the issuance of an Executive Order that would change the Manual for Courts-Martial to recognize, for the first time, a limited psychotherapist-patient privilege in proceedings under the UCMJ, with exceptions for military necessity and other special circumstances.

A military chaplain's privilege already exists; we are aware of no case in which a military chaplain has improperly reported homosexual conduct of a service member in violation of the privilege.

D. Recoupment/"Coming Out" Cases

We also considered the matter of the recoupment of benefits from service members who are discharged for homosexual conduct. It has been alleged that service members who acknowledged to their commanders that they were gay and were subsequently discharged were unfairly required to repay benefits that had been provided to them in connection with their service. Several different statutes authorize recoupment when a service member does not serve the full period of active duty that he or she had agreed to as a condition of receipt of financial assistance or benefits. Pursuant to these statutes, the Services may seek to recover educational assistance (e.g., ROTC, military academy, or law or medical school tuition), bonuses (e.g., reenlistment bonuses), or special

pays (e.g., for medical officers) from service members who, for whatever reason, fail to complete obligated terms of service. These statutes authorize recoupment of funds from service members who are discharged for a wide variety of reasons, not just those processed under the homosexual conduct policy.

As a matter of policy, the Department has stated that homosexual conduct constitutes a basis for recoupment if it is punishable under the UCMJ or if an other than honorable discharge is authorized under the circumstances. Statements acknowledging homosexual orientation generally do not provide a basis for recoupment unless it is expressly determined that the service member made the statement for the purpose of seeking separation from the military. For example, there have been cases in which medical and law school students, whose education had been financed by the government in return for a commitment to military service, made statements of homosexuality shortly after graduation. In such circumstances, if it is determined that the service members who had received taxpayer funds were not acting in good faith, our policy authorizes recoupment in order to protect the public purse from abuse.

Allegations have also been made that commanders sometimes conduct unnecessary and intrusive investigations of service members who "come out" as gay and do not contest separation. In particular, it has been argued that commanders often conduct needless investigations for the purposes of seeking recoupment, rather than taking statements of homosexuality at face value.

The decision whether to initiate an investigation when a service member acknowledges his or her homosexuality and does not contest separation has generally rested with the individual commander. We concluded that, in most of these cases, little or no investigation should be conducted. As we have noted above, however, it is appropriate in some instances for a commander to undertake an investigation to determine whether recoupment of financial benefits is warranted. In other cases, commanders may properly initiate investigations of service members who "come out" because of a concern that the service member's statement was fabricated in an effort to avoid a deployment or a service obligation.

We believe that the decision to initiate an investigation in a "coming out" case inevitably depends to a large extent on the facts of the individual case. To ensure appropriate review of such cases, we recommend that the Department issue guidance specifying that prior authorization for investigations in "coming out" cases will be obtained from the Service Secretaries of the Military Departments if the investigation will involve anything other than asking questions of the service member or individuals whom the member names for

the purpose of corroboration. This requirement should help ensure that such investigations will not be initiated without careful review and an appropriate basis.

E. Enlistment Forms

There have been complaints that the Services (primarily the Coast Guard on the East Coast) continue to employ obsolete enlistment forms promulgated in 1989 that include questions on sexual orientation.

The Department had authorized the continued, temporary use of the older enlistment forms as a cost savings measure. Although recruiters were trained and instructed to mark through the questions on sexual orientation, it is possible that in some instances they neglected to do so. In August 1997, the Department promulgated new recruiting forms, also used by the Coast Guard, that do not include questions on sexual orientation and directed the Services to discard all the old forms. Thus use of obsolete recruiting forms should no longer pose a problem.

F. Training

It has also been alleged that the training of service members on the homosexual conduct policy is inadequate.

Each member of the Armed Forces is expressly informed of the Department's policy on homosexual conduct as part of the accession process. Moreover, each of the Services devotes substantial efforts to training their commanders and attorneys on the policy, and in particular, on the limits the policy imposes on investigations of homosexual conduct. Such training is a permanent module for judge advocate officer courses, and regular presentations are made at commander courses and the Service war colleges. It is also a part of many continuing professional military education programs for both officer and enlisted personnel.

In conjunction with the implementation of the homosexual conduct policy, the Department of Defense published training guidance to the Services to assist them in the education of personnel on the policy. The Department directed that the training focus towards commander/leader orientation programs, courses for legal and personnel staff, recruiting and accession programs and professional military education and training. The Office of the Secretary of Defense reviewed and approved the Services' training plans prior to their implementation. In April 1995, the Office of the Secretary of Defense requested Service assessments of the implementation of training programs. The Service assessments indicated full implementation of training objectives.

Notwithstanding these efforts, we found that some commanders, attorneys and investigators report that they have not received training on the homosexual conduct policy. A lack of familiarity with the policy has likely been a contributing factor in those cases in which the policy has not been fully followed. Proper training of commanders, attorneys and investigators is essential to ensure that the privacy rights of our service members are respected in accordance with the policy. We recommend that the Service Inspectors General make the training of those charged with implementing the homosexual conduct policy--commanders, attorneys and investigators--a specific item of interest for inspection.

CONCLUSION AND RECOMMENDATIONS

This review was conducted by the Office of the Under Secretary of Defense for Personnel and Readiness in response to the direction of Secretary of Defense Cohen. The objective, as specified by the Secretary, was to determine how well the Department's policies are being applied and enforced.

We conclude that, while the balance that the policy strikes between the prohibition of homosexual conduct in the military and the privacy rights of service members has posed a challenge to the Services, proper implementation of the policy has been a priority and that the policy has, for the most part, been properly applied and enforced. We also believe, however, that there are specific steps that are warranted to enhance the implementation of the policy. Two such steps have been taken in recent months—the directive on how threats against alleged homosexual in the military services are to be handled, and the elimination of obsolete enlistment forms that could have resulted in unwarranted questions.

We recommend the following additional actions:

* First, to help ensure that investigations fully comply with the policy, the Department should issue guidance specifying that consultation with higher headquarters legal officials is recommended before initiating investigations into alleged homosexual conduct.

* Second, the Department should issue additional guidance on the use of pretrial agreements to obtain information on consensual sexual conduct. Since Department of Defense regulations provide that criminal investigations of any type of adult private consensual sexual misconduct should be limited to the factual circumstances directly relevant to the specific allegations, reducing a criminal sentence in order to obtain more allegations and thereby expand an investigation is inconsistent with the spirit of this policy. Therefore, pretrial agreements should take into account the seriousness of the crime with which

the service member has been charged and should generally not be employed unless the conduct at issue would warrant criminal prosecution.

* Third, in response to the concern that intrusive investigations have been conducted in "coming out" cases, our policy should provide that prior authorization for any substantial investigation in such cases should be established at the Service Secretary level in the Military Departments. * Fourth, in reissuing the memorandum providing guidelines for investigating threats against service members based on alleged homosexuality, the Department should include language to make clear that harassment of service members based on their alleged or presumed sexual orientation is unacceptable and that service members who engage in such harassment will be held accountable.

* Finally, we recommend that the Department issue guidance directing that Service Inspectors General make the training of all those charged with implementing the homosexual conduct policy—commanders, attorneys and investigators—a specific item of interest for inspection.

As stated above, the Department's policy on homosexual conduct represents a balance of the competing interests of personal privacy and good order and discipline in our Armed Forces. The Office of the Secretary of Defense, the Military Departments and the Services must continue to monitor this policy carefully to ensure that it is implemented properly, effectively and fairly. We believe that the actions recommended above will help ensure that our policy is faithfully executed.

TABLE I
DISCHARGE FOR HOMOSEXUAL CONDUCT
FISCAL YEAR 1980-1997

FISCAL YEAR	TOTAL DISCHARGED	PERCENT OF END STRENGTH	APPROXIMATE NUMBER PER 10,000
1980	1754	0.086%	9
1981	1817	0.088%	9
1982	1998	0.095%	10
1983	1815	0.086%	9
1984	1822	0.086%	9
1985	1660	0.078%	8
1986	1643	0.076%	8
1987	1380	0.064%	6
1988	1101	0.052%	5
1989	996	0.047%	5
1990	941	0.046%	5
1991	949	0.047%	5
1992	730	0.039%	4
1993	682	0.040%	4
1994	617	0.038%	4
1995	757	0.050%	5
1996	858	0.058%	6
1997	997	0.069%	7

TABLE II
BASIS FOR HOMOSEXUAL CONDUCT SEPARATIONS
BY GENDER
FISCAL YEAR 1997

STATEMENT			ACT/MARRIAGE		
MALE	FEMALE	TOTAL	MALE	FEMALE	TOTAL
626	194	820 (82%)	147	30	177 (18%)

TABLE III
SEPARATIONS IN FIRST YEAR OF SERVICE BY
YEARS OF SERVICE (YOS)
FISCAL YEAR 1997

LESS THAN 1 YOS	LESS THAN 4 YOS	MORE THAN 4 YOS	TOTAL
576 (58%)	816 (82%)	181 (18%)	997

APPENDIX L

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

LIEUTENANT RICHARD P. WATSON,

Plaintiff,

v.

WILLIAM J. PERRY, Secretary of Defense, JOHN E. DALTON, Secretary of the Navy, UNITED STATES OF AMERICA,

Defendants.

NO. C95-1141Z

DECLARATION OF RICHARD P. WATSON IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

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I, Richard P. Watson, declare:

1. I am the plaintiff in this action. I have personal knowledge of the facts stated herein and if called as a witness could testify competently thereto.

CHRONOLOGY OF NAVY CAREER

2. I enlisted in the United States Navy on or about July 20, 1981 and entered into active duty in October 1981. In December 1981, I received a Commendation from Commanding Officer B. A. Wiley naming me as Honor Recruit for my company, an award that recognizes a single outstanding recruit out of a battalion of nearly 200 people. See Exhibit A(14) at p.90. On May 5, 1982, I completed Electrician's Mate Class "A" School as an honors graduate, an honor reserved for less than ten percent of the graduates of Navy training schools. As a result, I received an accelerated promotion to Electrician's Mate 3rd Class. In addition, I received a special Letter of Commendation from Commanding Officer R. P. Greenman for successfully performing the Heimlich maneuver on a choking woman. See Exhibit A(14) at p.96 and p.88.

3. After one year in the enlisted ranks, I was accepted into a Navy pilot program known as the Enlisted Commissioning Program, Nuclear Option. That program is intended to select and promote highly qualified and motivated enlisted personnel who show potential for officers' careers in the Nuclear Forces of the United States Navy. Accordingly, the Commander of the Submarine Force of the United States Pacific Fleet, Rear Admiral B. M. Kauderer, informed me in writing that "[y]ou can be justly proud of this exceptional accomplishment." See Exhibit A(14) at p.100.

4. Through the enlisted Commissioning Program, I attended the University of New Mexico, obtaining a Bachelor of Science degree in applied mathematics in August, 1986. From November 1986 through April 1987, I attended Officer Candidate School, and received my commission as an Ensign on or about April 3, 1987. The Commanding Officer of the Naval Nuclear Power School informed me, in writing, that "you were identified as one of a select few among your peers who best exhibited the outstanding leadership qualities and potential required. ... I am confident that you will continue to develop and exhibit those qualities of personal example and moral responsibility that have earned you this recognition." See Exhibit A(14) at p.101.

5. In May 1987, I reported to the Naval Nuclear Power School in Orlando Florida. Upon graduating from the Nuclear Power School in October 1987, I reported to the Navy's Nuclear Propulsion Training Unit in Idaho

Falls, Idaho, for additional training. From May 1988 to September 1988, I attended the Submarine Officer Basic Course in Groton, Connecticut.

6. On September 26, 1988, I signed an oath in conjunction with my commission. That oath included the following statement:

I serve in the forces which guard my country and our way of life. I am prepared to give my life in their defense. ... I will never forget that I am an American. Responsible for my actions, and dedicated to the principles which made my country free.

See Exhibit D at p.223. I have willingly and faithfully obeyed my oath to this date.

7. I was assigned to the U.S.S. Henry M. Jackson on or about September 26, 1988, and served aboard the U.S.S. Henry M. Jackson until September, 1992. The U.S.S. Henry M. Jackson is a Trident Missile Submarine, homeported in Bangor, Washington. I served as Reactor Controls Assistant and Main Propulsion Assistant until I was promoted to Lieutenant Junior Grade in April 1989.

8. On September 12, 1989, I was designated as "Qualified in Submarine Warfare," an honor that accorded me the privilege of wearing the Gold Dolphins. Qualifying in submarines signifies that one is qualified to operate the submarine in its highest state of readiness and with the full confidence of the Commanding Officer. Few achieve this designation in less than a year, as I did. Accordingly, in communicating my designation to the Commanding Officer of the U.S.S. Henry M. Jackson, the Commander of Submarine Squadron 17 noted that I "demonstrated the high degree of excellence required" for such a designation. See Exhibit A(14) at pp. 109-114.

9. On or about March 31, 1990, I was awarded a Letter of Commendation from the Commanding Officer of the U.S.S. Henry M. Jackson for outstanding performance of duty. See Exhibit A(14).

10. I received the National Defense Service Medal for Service on Active Duty in August, 1990. This honor recognized my service to the submarine force and my nation during the Persian Gulf War. See Exhibit D at pp. 224, 226.

11. I was promoted to lieutenant in the United States Navy on May 1, 1991 by A. B. Chaloupka, Commanding Officer of the U.S.S. Henry M. Jackson.

12. I was awarded the Navy Achievement Medal for "Professional Achievement in the Superior Performance of His Duties" while servicing as Damage Control Assistant aboard the U.S.S. Henry M. Jackson from September 1991 to November 1991. See Exhibit A(14) at p.86. In particular, the Citation presented to me on behalf of the Secretary of the Navy stated, in part:

Lieutenant Watson consistently performed his demanding duties in an exemplary and highly professional manner. His tactical insight and understanding of strategic concepts led to his outstanding performance as Officer of the Deck during a Tactical Readiness Examination. ... Lieutenant Watson's exceptional professional abilities, initiative, and loyal dedication to duty reflected great credit upon himself and were in keeping with the highest traditions of the United States Naval Service.

13. Because I was previously awarded the Navy Achievement Medal, on October 31, 1992, the Secretary of the Navy, through Rear Admiral R.A. Riddell, awarded me a "Gold Star in Lieu of the Second Navy Achievement Medal" in recognition of my outstanding performance from September 1989 through September 1992. See Exhibit A(14) at p.85. Rear Admiral Riddell stated, in particular:

Lieutenant Watson consistently performed his demanding duties in an exemplary and highly professional manner. Through seven Strategic Deterrent Patrols, Lieutenant Watson's impressive leadership, engineering skill and superb insight into the tactical execution of the TRIDENT mission have been instrumental in the ability of the ship to maintain a high state of operational readiness.

14. My final position aboard the U.S.S. Henry M. Jackson was that of Tactical Systems Officer, a Department Head billet typically reserved for second tour officers. I achieved this position on my first tour.

15. From September 1992 through approximately March 31, 1995, I was assigned to the Naval Reserve Officers Training Corps ("NROTC") of Oregon State University in Corvallis, Oregon. My primary duties were to serve as an Assistant Professor of Naval Science, as the Nuclear Programs Coordinator, and as the Command Security Manager.

16. In February 1994, I was nominated for the DAR Reese Excellence in Advising Award by Commander David Ward, the Executive Office of NROTC at Oregon State University. See Exhibit A(13). The DAR Reese award is a prestigious award that recognizes and commends outstanding achievement in counseling and advising. Commander Ward's nomination stated, in part:

He provides leadership, through daily personal example, an essential and critical element to the growth and development of future naval leaders. ... Lt. Watson's efforts have directly contributed to the overall academic development and excellence of the 120 students involved in the NROTC program.

See Exhibit A(13) at p.80.

17. In a similar manner, one of my naval engineering students, Casey Casad, submitted a recommendation in support of my nomination for the DAR Reese award (see Exhibit A(13)) that stated, in part:

Lt. Watson is a very dynamic and inspirational leader. His professional competency makes him a role model for myself and many of my contemporaries. Although Mr. Watson is no longer my class advisor, I regularly seek his advice as I pursue my degree.

See Exhibit A(13) at p.81.

18. Major D. K. Hough of the United States Marines also submitted a recommendation on my behalf (see Exhibit A(13)) that stated, in part:

Lt. Watson is one of the most dedicated faculty advisors I have had the privilege to be associated with. In the classroom he projects self-confidence, authority, and enthusiasm, inspiring confidence and respect from his students. A team player, he maximizes the opportunities presented him in each and every situation providing an outstanding work and academic environment for all concerned.

See Exhibit A(13) at p.83.

19. In July 1994, I was nominated for the 1994 Chief of Naval Education and Training Instructor of the Year Award, a prestigious award presented to one officer instructor and one enlisted instructor each year by the Chief of Naval Education and Training.

20. On September 16, 1994, I received a Letter of Appreciation from Captain M.R. Rice, commending me for volunteering in the Tunison Park Volunteer Outreach Program during the summer of 1994. See Exhibit D at p.202.

21. While at NROTC, I have also sought to further my own education. Towards that end, I have been enrolled in courses towards obtaining a Masters Degree in Business Administration. It is absolutely expected that Naval officers obtain graduate degrees, and without such a degree, continued promotions and advancement are impossible. I have been able to enroll in courses for a nominal fee at Oregon State University and have maintained a G.P.A. of approximately 3.76 in my work towards a Masters Degree.

22. On October 28, 1994, I submitted to my Commanding Officer at NROTC a single page document titled "Submission of Sexual Orientation Statement," in which I wrote, among other things: "I have a homosexual orientation. I do not intend to rebut the presumption." I submitted the Statement of Sexual Orientation because of my commitment to honesty, truthfulness, and integrity, values I was charged with teaching to students in the Naval ROTC. See Exhibit A(2). I also anticipated assignment to a vessel command in the future and wanted to eliminate any potential for a blackmail threat that could derail or delay such an assignment. My statement that I have a homosexual orientation means that I am gay. My statement that "I do not intend to rebut the presumption" means that I will not retract or contradict the statement that I am gay. My statement is based on my commitment to integrity and I will not lie to retract or contradict it.

23. On December 15, 1994, I was notified that Administrative Show Cause Proceedings had been commenced against me and that a Board of Inquiry would be convened at which I would be required to show cause for retention in the Naval Service. See Exhibit A(4). I was notified that:

You may rebut the presumption by presenting evidence demonstrating that you do not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts.

24. On March 1, 1995, proceedings were held before the Board of Inquiry. The Navy presented no witnesses, and relied solely on my written Statement of Sexual Orientation. See Exhibit A. The Board of Inquiry deliberated for twenty-two minutes, and, by a vote of 3 to 0, recommended that I be separated "from the naval service by reason of homosexual conduct." See Exhibit A(17).

25. Shortly after the Board's decision, I was transferred to the Transient Personnel Unit in Bangor Washington.

26. On June 14, 1995, I received a Notice of Discharge, which ordered me to separate from the United States Navy in July 1995. See Exhibit H. This Notice was my first notice that my discharge was final, irrevocable and imminent.

27. Several days later, on approximately June 21, 1995, I received a corrected Notice of Discharge. See Exhibit H. Like the earlier Notice, this Notice ordered me to separate from the United States Navy on any date of my choosing in July 1995. The second notice also informed me that, pursuant to Navy regulations, my separation pay would be half that to which a heterosexual separated from the Navy would be entitled.

28. I selected July 31 as the date for my ordered separation.

29. The Navy is the only career I have held or have wanted to hold. It is my only current means of support. I own a home subject to a mortgage, and the loss of my salary will likely cause me to lose my home and my finances will be irrevocably devastated.

30. Absent my discharge on July 31, 1995, I would be on track for promotion to the rank of Lieutenant Commander by the end of this year. An interruption of my service will deny me that opportunity and cause me a permanent, irreparable setback in the competitive process of promotions and choice assignments.

31. With only three courses remaining in my Master's Degree program, a discharge will preclude me from obtaining that degree.

32. I expect that my discharge will identify homosexuality as the cause, implying that some form of misconduct caused my separation, when that is not the case.

33. My discharge will cause me humiliation by virtue of my being stripped of my position and duties not because of any misconduct or incapacity, but solely because of who I am and my honestly revealing that fact.

AUTHENTICATION OF ATTACHED EXHIBITS

34. Attached hereto as Exhibit A is a true and correct copy of the transcript of proceedings taken before the Naval Board of Inquiry on March 1, 1995.

35. Attached hereto as Exhibit A(1) is a true and correct copy of the index to the Recorder's Exhibits presented before the Naval Board of Inquiry on March 1, 1995.

36. Attached hereto as Exhibit A(2) is a true and correct copy of the Recorder's First Exhibit. That Exhibit is my Statement of Sexual Orientation, which I submitted to my Commanding Officer on October 28, 1994.

37. Attached hereto as Exhibits A(3) through A(9) are true and correct copies of the remainder of the Recorder's Exhibits presented to the Board of Inquiry. These document the transmission of my Statement through various channels and the convening of the Board of Inquiry. In addition, Exhibit A(9) contains the Navy's regulations regarding service by homosexuals.

38. Attached hereto as Exhibit A(10) is a true and correct copy of the index of exhibits I presented to the Board of Inquiry.

39. Attached hereto as Exhibit A(11) is a true and correct copy of my biographical sketch as presented to the Board of Inquiry.

40. Attached hereto as Exhibit A(12) are true and correct copy of my Fitness Reports. Although these reports are printed on both sides of paper, the copies of Fitness Reports presented to the Board of Inquiry were copies of only one side. Accordingly, attached hereto as Exhibit C are true and correct copies of my Fitness Reports, reflecting all pages, as taken from my official Service Jacket for Evaluations.

41. Attached hereto as Exhibit A(13) are true and correct copies of my nomination and supporting materials for the DAR Reese Excellence in Advising Award.

42. Attached hereto as Exhibit A(14) are true and correct copies of various awards I have received during my service in the Navy, including two Navy Achievement Medals and various letters of commendation.

43. Attached hereto as Exhibit A(15) is a true and correct copy of my record of Security Clearance.

44. Attached hereto as Exhibit A(16) is a true and correct copy of a letter submitted by my parents on my behalf to the Board of Inquiry.

45. Attached hereto as Exhibit A(17) is a true and correct copy of the Board of Inquiry's Report recommending discharge.

46. Attached hereto as Exhibit B is a true and correct copy of a Letter of Deficiency and supporting materials submitted to the Board of Inquiry on March 28, 1995 as well as the Commander of the Naval Base Seattle's response to that Letter of Deficiency.

47. Attached hereto as Exhibit C are true and correct copies of my Fitness Reports, reflecting all pages, as taken from my official Service Jacket for Evaluations.

48. Attached hereto as Exhibit D are true and correct copies of excerpts of my official Service Record.

49. Attached hereto as Exhibit E are true and correct copies of Department of Defense Instructions governing separation pay, including separation pay for homosexuals.

50. Attached hereto as Exhibit F is a true and correct copy of my Commanding Officer's Request to the Secretary of the Navy that I be awarded full separation pay as well as the Navy's disapproval of that request.

51. Attached hereto as Exhibit G is a true and correct copy of a letter I received from the office of the Honorable Elizabeth Furse, a Congresswoman from Oregon. That letter is from C. West of the Bureau of Naval Personnel to Ms. Furse, explaining that because I revealed my homosexual orientation to my Commanding Officer, I am not entitled to full separation pay. I had asked Ms. Furse to intercede in my behalf in securing my full separation pay.

52. Attached hereto as Exhibit H is a true and correct copy of my first Notice of Discharge. I received this Notice on June 14, 1995.

53. Attached hereto as Exhibit I is a true and correct copy of my second Notice of Discharge. I received this notice on approximately June 21, 1995. This final Notice of Discharge differs from the earlier notice in that it explicitly sets separation pay at half of the amount to which I would otherwise be entitled.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: July 24, 1995

/S/

Richard P. Watson

28 October 1994

From: Richard P. Watson, LT, USN, 129-56-5263/1120
To: Secretary of the Navy, Washington, DC
Via: Chief of Naval Personnel, Washington, DC
Chief of Naval Education and Training, Pensacola, FL
Commanding Officer, NROTC Unit, Oregon State University, Corvallis, OR

Sub: SUBMISSION OF SEXUAL ORIENTATION STATEMENT ICO RICHARD P. WATSON, LT, USN, 129-56-5263/1120

1. As a United States Naval Officer I feel compelled to provide my superiors with truthful information regarding my sexual orientation so that they may make a thoughtful and careful judgment with regards to my future in the United States Naval Service. I have stressed the hallmarks of truthfulness and honesty to my subordinates and peers alike. Therefore, when I decided to make this statement, the choice was very clear. I did not hesitate.

2. I have a homosexual orientation. I do not intend to rebut the presumption.

3. This statement reflects my steadfast and undying conviction for our Navy's core values that I espouse to profess and uphold: Honor, Commitment, and Courage. Each of these values has significant meaning to me considering the above statement. I have served with honor throughout my thirteen years of enlisted and officer service, and my service record will support that fact. I am committed to honesty, truthfulness, and integrity. I teach these leadership characteristics to my students in Naval ROTC by lecturing, "You need to stand by your words even if they are not the most popular". Finally, there is courage. It is with a tremendous amount of mental and moral courage that I make the above statement.

4. I strongly desire to retain my regular commission and complete my highly successful career. Although the Department of Defense policy on homosexuals may force you to take actions which will not allow my continued service.

5. I await your instructions.

Very Respectfully Submitted,
/s/
Richard P. Watson, LT, USN

Copy to:
Honorable Elizabeth Furse
Honorable Mark O. Hatfield
Honorable Bob Packwood
Honorable Cliff Trow
American Civil Liberties Union
Sericemembers Legal Defense Network
Veterans for Human Rights
Lambda Legal Defense Fund
Frank Divon
McKisson Sargent & Ohason
Oregon State University Affimative Action

APPENDIX M

____FILED ____ENTERED
____LODGED ____RECEIVED

MAR 07 1996

At SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LIEUTENANT RICHARD P. WATSON,	)	
	)	NO. C951141Z
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
WILLIAM J. PERRY, Secretary of Defense, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

After fourteen years of exemplary military service, Lieutenant Richard P. Watson submitted a statement to his commanding officer declaring that he had a "homosexual orientation," and stating that he would not "rebut the [statutory] presumption" that servicemembers who state they are homosexuals engage in or have a prosperity to engage in homosexual conduct. Pursuant to the Department of Defense's so-called "Don't Ask, Don't Tell" policy regarding homosexuals in the military, the Navy instituted discharge proceedings against Lt. Watson. Based on Watson's initial statement, a further statement to the Board or Review, and his failure to produce any evidence rebutting the presumption, the Navy ordered Lt. Watson's separation from service. Lt. Watson then initiated this action challenging on due process,

equal protection, and free speech grounds the constitutionality of the "Don't Ask, Don't Tell" policy and implementing regulations.

The parties have now cross-moved for summary judgment. The Court hear argument on January 19, 1996, and, having considered the parties' briefs and arguments, hereby GRANTS the Government's motion for summary judgment and DENIES the plaintiff's motion for summary judgment.

Summary of Decision

Lt. Watson has challenged the "Don't Ask, Don't Tell" policy as unconstitutional on its face. The Court does not reach this issue because the statements made by Lt. Watson to the Navy support the conclusion that the policy was constitutionally applied to him. It is well established that the armed forces may prohibit homosexual conduct. Because homosexual conduct may constitutionally be prohibited, administrative discharges based on propensity or intent to engage in homosexual acts, as evidenced by servicemembers' statements, do not violate equal protection. Here, Lt. Watson made a statement that he had not and would not engage in homosexual conduct with any military students or service members during the performance of military duty or while on any military installation. Because the Navy could properly draw an adverse inference from Watson's selective omission of any reference to off base, off duty conduct with non-military personnel, there is not basis for finding the policy was unconstitutionally applied to him. He was not discharged solely for acknowledging his sexual orientation, but rather for making statements manifesting an intent or propensity to engage in proscribed homosexual conduct.

The Court's decision to grant the Government's motion for summary judgment should not be interpreted as an endorsement of the military's "Don't Ask, Don't Tell" policy or the way it has been applied in general. Regrettable, enforcement of the existing policy has resulted in the expulsion from the armed forces of many outstanding men and women who served their country with honor and dignity. The Court may not, however, question the wisdom of the policy or substitute its judgment for that of Congress. Rather, the Court's role is limited to determining whether the policy enacted by congress was constitutionally applied to Lt. Watson. The Court concludes that it was.

Background

Plaintiff Richard Watson is currently a lieutenant in the United States Navy. Lt. Watson enlisted in the Navy in July 1981. A year later, the Navy selected Lt. Watson to participate in the Enlisted Commissioning Program, under which highly qualified enlisted personnel may achieve officer status. Under this program, Lt. Watson attended the University of New Mexico, obtaining a Bachelor of Science degree in mathematics in August 1986. After completing Officer Basic Course, Lt. Watson served aboard the U.S.S. Henry M. Jackson from September 1988 until September 1992. During this period, Lt. Watson received many honors including a Letter of Commendation from the Commanding Officer of the U.S.S. Henry M. Jackson, the National Defense Service Medal for Service on Active Duty, the Navy Achievement Medal for "Professional Achievement in the Superior Performance of his Duties," and a Gold Start in lieu of a second Navy Achievement Medal.

From September 1992 until March 1995, Lt. Watson served as an Assistant Professor of Naval Science in the Naval Reserve Officers Training Corps (NROTC) at Oregon State University. During this period, Lt. Watson sought to obtain a Masters Degree in Business Administration, which he viewed as necessary for continued promotion and advancement in the Navy.

On October 28, 1994, Lt. Watson delivered to his Commanding Officer a one-page document titled "Submission of Sexual Orientation Statement." Paragraph 2 reads: "I have a homosexual orientation. I do not intend to rebut the presumption." Lt. Watson explains in his declaration that he submitted the statement (1) because of his commitment to honesty, truthfulness, and integrity, and (2) to eliminate any potential for blackmail threat in the event he received a vessel command assignment. Based on this letter, the Navy issued a show cause order requiring Watson to show cause before a Board of Inquiry why he should be retained in the Naval Service.

On March 1, 1995, a Navy Board of Inquiry was convened. Although the Board reminded Watson that to avoid discharge he would have to rebut the presumption that he engages in or intends to engage in homosexual acts, Watson presented no such evidence. Instead, he recounted his many accomplishments during fourteen years of military service and emphasized his commitment to the Navy and its core values. Watson's counsel argued to the Board that Watson's statement, "I do not intend to rebut the presumption" was made without the assistance of counsel and without full understanding of "what a presumption is." The Board concluded that although they had no doubt that Watson was "an outstanding performer," he failed to offer any evidence to rebut the presumption. As a result, the Board voted 3 to 0 to

recommend the honorable discharge of Lt. Watson "by reason of homosexual conduct."

On March 28, 1995, Lt. Watson's civilian counsel submitted a letter of deficiency for consideration by the Commander of Naval Base Seattle and the Board of Review in their review of the Board of Inquiry's recommendation. The letter included the following statement by Lt. Watson:

a. I expressly deny that I have engaged in any homosexual conduct with any military student or service member.

b. I expressly deny that I engaged in any homosexual conduct during the performance of military duty, or while on any military installation.

c. I expressly deny that I have any intent or propensity to engage in any conduct described above.

In April 1995, the commander of Naval Base Seattle issued a report in which he approved and concurred in the Board of Inquiry's findings, and recommended to the Chief of Naval Personnel that Watson be separated form service. The Commander concluded that Watson's letter of deficiency failed to rebut the presumption and was, in fact, "persuasive as much for what it does not deny as for what it does." The "Don't Ask, Don't Tell" policy "appl[ies] to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty of off duty." 10 U.S.C. § 654 (a) (10). Thus, homosexual conduct that requires separation from service is not limited to the circumstances addressed in Watson's letter of deficiency, namely off duty, off base conduct with non-military personnel. Because Watson was silent as to his intent or propensity to engage in homosexual conduct under circumstances other than described in his statement, the Commander concluded that his statement supported, rather than rebutted, the presumption.

Commander concluded that Watson's letter of deficiency failed to rebut the presumption and was, in tact, "persuasive *as* much for what it does not deny as for what it does. The "Don't Ask, Don't Tell" policy appl[ies] to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty." 10 U.S.C. 654(a) (10). Thus, homosexual conduct that requires separation from service is not limited to the circumstances addressed in Watson's letter of deficiency, namely of f duty, off base conduct with non-military personnel. Because Watson was silent as to his intent or propensity to engage in homosexual conduct under circumstances other than described in

his statement, the Commander concluded that his statement supported, rather than rebutted, the presumption.

The Commander also rejected Watson's argument, made to the Board of Inquiry, that his initial statement, "I do not intend to rebut the presumption" was made "without any counseling from lawyers," and therefore should be construed only as a statement that he did not want an embarrassing inquiry into his private life. The Commander concluded that Watson's legal ignorance was substantially contradicted by his statement that he sent copies of his declaration to various officials and interest groups on the advice of his lawyer.

On May 2, 1995, the Board of Review voted unanimously to recommend Watson's separation from service with an honorable discharge. In June 1995, the Navy sent Lt. Watson a Notice of Discharge and an amended Notice of Discharge. The amended Notice of Discharge informed Lt. Watson that he would receive

50% of the standard separation pay.

On July 25, 1995, Lt. Watson initiated this action against Secretary of Defense William J. Perry, Secretary of the Navy John E. Dalton, and the United States. In this action, Lt. Watson challenges the constitutionality of the Policy Concerning Homosexuality in the Armed Forces (colloquially known as the Don't Ask, Don't Tell" policy) 10 U.S.C. § 654, and the Department of Defense regulations promulgated thereunder. The statute provides in relevant part as follows:

> (b) Policy. -- A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved
>
> > (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
>
> (f) Definitions. -- In this section:
>
> > (1) The term "homosexual" means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms "gay" and "lesbian".

10 U.S.C. § 654.

Department of Defense Directive 1332.30 further defines a statement that a member is a homosexual or bisexual or words to that effect[1] as [l]anguage or behavior that a reasonable person would believe was intended to convey the statement that a person engages in, attempts to engage in or has a propensity or intent to engage in homosexual acts.

Definitions ¶ 18, Department of Defense (DOD) Directive. The Directive also defines "sexual orientation" as "[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts." Id. ¶ 16. The Directive states that "[a] member's sexual orientation is considered a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct in the manner described in section C.1." Reasons for Separation § C, at p. 2-1. Section C.l.b. repeats the language of 10 U.S.C. § 654(b)(2), and further provides:

A statement by an officer that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. . . . In determining whether an officer has successfully rebutted the presumption . some or all of the following may be considered:

(1) Whether the officer has engaged in homosexual acts;

(2) The officer's credibility;

(3) Testimony from others about the officer's past conduct, character, and credibility;

(4) The nature and circumstances of the officer's statement;

(5) Any other evidence relevant to whether the officer is likely to engage in homosexual acts.

DOD Directive, Reasons for Separation, § C.1.b., at p. 2-2.

Lt. Watson challenges the "Don't Ask, Don't Tell" policy on First (Free Speech) and Fifth (Equal Protection and Due Process) Amendment grounds, and brings a claim under the Administrative Procedure Act (APA) challenging the Navy's refusal to provide him with full separation pay. With his complaint, Lt. Watson filed a motion for a temporary restraining order and a preliminary injunction, docket no. 2. On August 8, 1995, after hearing oral argument, the Court issued a preliminary injunction enjoining the Navy from discharging Watson or taking any adverse action against him pending the outcome of this litigation.

The parties now move for summary judgment. Lt. Watson claims that the "Don't Ask, Don't Tell" policy violates the due process and equal protection clauses of Fifth Amendment because it is based solely on prejudice against homosexuals and discriminates, without any rational justification, against homosexual servicemembers on the basis of status alone Watson argues further that the "Don't Ask, Don't Tell" policy is aimed at suppressing protected speech and therefore cannot withstand First Amendment scrutiny.

The Government counters that it is constitutionally permissible for the armed forces to prohibit homosexual conduct, which is the aim of the "Don't Ask, Don't Tell" policy. The Government emphasizes that the policy is "conduct based," excluding only those servicemembers who engage in homosexual conduct or who make statements demonstrating that they have engaged or are likely to engage in homosexual conduct. As to plaintiff's First Amendment argument, the Government contends that servicemembers who are discharged based on their declarations of homosexuality are not being punished for their speech; rather, the Government is using the statement as evidence of prohibited homosexual conduct.

Discussion

I. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Here, there are no material issues of fact in dispute. The parties disagree only on the application of the law to these facts. As a result, this case is ripe for summary adjudication.

II. Deference to the Military

As this Court recognized in Cammermever v. Aspin, 850 F.Supp. 910, 915-916 (W.D. Wash. 1994), courts reviewing constitutional challenges to military actions must be mindful of the special level of deference accorded military decisions. While there is no "military exception" to the Constitution, "[r]egulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessities." Beller v. Middendorf, 632 F.2d 788, 811 (9th Cir. 1980), cert denied, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1981).

The Constitution confers broad powers on the President and Congress to raise and support armies, provide and maintain a naval force, and promulgate rules governing and regulating both land and naval forces. Traditionally,

courts have recognized the Constitution's mandate by according significant deference to the "considered professional judgment" of military officials regarding the composition of the armed forces. Goldman v Weinberger, 475 U.S. 503, 508, 106 S.Ct. 1310, 1313, 89 L.Ed.2d 478 (1986). "While it is clear that one does not surrender his or her constitutional rights upon entering the military, the Supreme Court has repeatedly held that constitutional rights must be viewed in light of the special circumstances and needs of the armed forces." Beller, 632 F.2d at 810. As the Supreme Court has reflected:

> "[It] is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches."

Rostker v. Goldberg, 453 U.S. 57, 65-66, 101 S.Ct. 2646, 2652, 69 L.Ed.2d 478, 487 (1981) (quoting Gilligan v. Morgan, 413 U.S. 1, 10, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973)).

The plaintiff has argued forcefully and persuasively that gay and lesbian servicemembers have served honorably in the military for years; that gay and lesbian servicemembers are currently serving with distinction, without disrupting order and good discipline; that one's sexuality is a personal and private matter; and that prejudice is at the heart of the military's policy concerning gays and lesbians in the military. The Court has no doubt that many gays and lesbians have served and continue to serve this country honorably, without impeding the goals of the military, and that many other servicemembers would like to see homosexuals ousted merely because of their sexual preference. This Court is not permitted, however, to substitute its own judgment for that of Congress and the military or to question the wisdom of the military's policy. The policy must be upheld so long as it is constitutional. It is also not within this Court's power to revisit legal issues conclusively resolved by the Supreme Court in Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841 92 L.Ed.2d 140 (1986).1 See also Meinhold V. U.S Dept. of Defense, 34 F.3d 1469, 1477 (9th Cir. 1994). As a result, the Court must reject the argument that homosexual conduct cannot be proscribed by the military. Consistent with the principles of deference to the military and binding precedent, the Court's task is limited to determining whether the policy

1 Hardwick involved a due process challenge to a Georgia statute which made sodomy a crime. Hardwick challenged the statute after being discovered engaging in sodomy with another consenting adult in the privacy of his own home. The Supreme Court held that the Constitution confers no fundamental

right upon homosexuals to engage in sodomy. unconstitutionally infringes on Lt. Watson's constitutional rights as considered in the context of the military.

III. Must Lt. Watson Exhaust His Administrative Remedies?

The defendant argues that this Court should require Watson to exhaust intramilitary remedies before adjudicating his constitutional claims. In Meinhold, the Ninth Circuit rejected a similar argument by the Government, noting that appeal to the Board for the Correction of Naval Records (BCNR) would have been futile. The Court concluded that because the Navy's position was that the Board had to recommend separation if it found Meinhold to be homosexual, and that a servicemember is homosexual if he makes a statement that he is, there would be no grounds on which the BCNR could reach a different disposition than the Board. The same reasoning applies here. Because Watson failed to submit any evidence to rebut the presumption, there would be no basis for the BCNR to reach a contrary result. As a result, the Court concludes

2 The "Don't Ask, Don't Tell" policy has been challenged on constitutional grounds in several cases. The policy has been upheld as applied in Richenberg v. Perry, 909 F.Supp. 1303 (D. Neb. 1995) (Captain in the Air Force was discharged for stating he is a homosexual); Philips v. Perry, 883 F.Supp 539 (W.D. Wash. 1995) (Petty Officer was discharged for stating he engaged in homosexual acts and was a homosexual); and Selland v. Perry, 905 F.Supp. 260 (D. Md. 1995) (Lieutenant in the Navy was discharged for making statement that he was homosexual and involved in a monogamous relationship). Only one court has held that the policy is facially invalid on equal protection, due process, and First Amendment grounds. See Able v. United States, 880 F.Supp. 968 (E.D.N.Y. 1995) (six members of the Armed Services made statements of homosexual orientation) . Several of these cases are currently on appeal. that exhaustion is not required because further administrative proceedings would be futile.

The Court also concludes that constitutional review is not precluded by the Administrative Procedure Act ("APA") . In Darby v. Cisneros, 509 U.S. 137, 113 S.Ct. 2539, 125 L.Ed.2d 113, 127 (1993), the Supreme Court held that "where the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." (Emphasis in original) . Because appeal to the Board for the Correction of Naval Records is discretionary, not mandatory, Watson is not precluded from bringing claims under the APA. See 10 U.S.C. § 1552.

IV. Equal Protection Challenge

A. Standard

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its Lt. Watson clarified in his briefs that his sole claim under the APA relates to the Navy's failure to award him full separation pay, which becomes an actual controversy only if he is eventually discharged. Plaintiff is not bringing a claim under the APA based on the Navy's actions in discharging him because he does not believe the Navy exceeded or acted contrary to statutory authority. Watson contends that the Navy acted in conformity with, rather than against, the policy and regulations at issue here. Because it is the policy and regulations themselves which are allegedly unconstitutional, plaintiff contends he has no APA claim based on the agency's adherence to that policy; instead, "the only route towards plaintiff's objective, i.e., to remain in the Navy, is consideration of his constitutional claims." Plaintiff's Brief in Support of Summary Judgment at 19. jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 320 (1985) (quoting Plyler v Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)). While the Fifth Amendment does not contain an equal protection clause, the due process clause of the Fifth Amendment has an equal protection component that applies to the federal government. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

The Ninth Circuit has held that homosexuals are not a suspect or quasi-suspect class for equal protection purposes; therefore, judicial review of a classification based on homosexuality is limited to the rational basis test. High Tech Gays v. Defense Indus Sec Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990). Under this standard, a discriminatory classification is presumed valid and will be sustained "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Heller V. Doe, 509 U.S. ___, 113 S.Ct. 2637, 125 L.Ed.2d 257, 270 (1993).

Rational basis review is a two-step process. Jackson Water Works, Inc. v. Public Utilities Comm'n, 793 F.2d 1090, 1094 (9th Cir. 1986), cert. denied, 479 U.S. 1102, 107 S.Ct. 1334, 94 L.Ed.2d 184 (1987). Initially, the court must determine whether the challenged classification serves a legitimate governmental purpose. If the court answers this question in the affirmative, the court must then determine whether the discriminatory classification is rationally related to the achievement of that legitimate purpose. A

discriminatory classification that is based on prejudice or bias is not rational as a matter of law. See Palmore v. Sidoti, 466 U.S. 429 104 S.Ct. 1879, 80 L.Ed.2d 421, 426 (1984) (mother could not be denied custody of her child based on social disapproval of her interracial marriage) ; Cleburne, 473 U.S. at 448, 105 S.Ct. at 3259, 87 L.Ed.2d at 326 (city could not require a special use permit for group home for the mentally retarded where the requirement was based on prejudice)

Plaintiff does not dispute that the government has a legitimate interest in maintaining the readiness and combat effectiveness of its military forces Thus, the first part of the test is satisfied. The parties disagree, however, as to the second part of the test -- whether the classification is rationally related to that purpose.

B. Is the Policy Unconstitutional on its Face?

In Meinhold, 34 F.3d at 1478, the Ninth Circuit, in addressing the equal protection implications of the military's former policy concerning homosexuals in the armed forces, recognized that equating status with conduct or acts that are prohibited is "problematic," and questioned whether it could ever be "rational to presume that one class of persons (identified by their sexual preference alone) will violate regulations whereas another class (identified by their preference) will not." The court avoided reaching the constitutional question, however, because it construed the former policy as permitting discharge from service only where the servicemember makes "statements that show a concrete, fixed, or express desire to commit homosexual acts." Id. at 1479. The court found that Meinhold's statement, "I am in fact gay, I' manifested no concrete, expressed desire to commit homosexual acts, and therefore his discharge on the basis of that statement alone could not stand.

Lt. Watson contends that the military's new "Don't Ask, Don't Tell" policy, codified at 10 U.S.C. § 654, suffers from the constitutional infirmities recognized in Meinhold, in that it presumes, without any rational basis, that servicemembers who merely state their homosexual orientation will engage in prohibited conduct. Watson notes that no such presumption attaches to statements of servicemembers who declare their heterosexual orientation. Although the presumption of homosexual conduct is rebuttable, plaintiff contends that it is virtually impossible for servicemembers to rebut that presumption without explicitly retracting their statements and repudiating their own sexual identity.

Watson argues that because the express language of the statute offends Meinhold, the new policy is unconstitutional on its face and must be struck

down. Plaintiff's claims of facial invalidity are based on § 654(b) (2) of the policy, which provides for separation from service where: the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

Plaintiff contends that this language permits discharge based solely on statements of sexual orientation, which is constitutionally suspect under Meinhold, 34 F.3d at 1478, and no other redeeming construction of the policy is possible.

Courts are obligated to consider nonconstitutional claims and avenues for relief prior to considering constitutional claims. Jean v Nelson, 472 U.S. 846, 854, 105 S.Ct. 2992 86 L.Ed.2d 664 (1985). In addition, with limited exceptions, facial challenges to statutes must be rejected unless there exists no set of circumstances in which the statute can constitutionally be applied. United States v Salerno, 481

U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied

The Supreme Court described these limited exceptions in Broadrick v. Oklahoma, 413 U.S. 601, 611-612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). One exception is a facial challenge based on First Amendment free-speech grounds. The Supreme Court has applied to statutes restricting speech the "overbreadth doctrine," which renders a statute invalid in all its applications if it is invalid in any of them. Lt. Watson's challenge to the statute on First Amendment grounds is addressed separately. unconstitutionally to others, in other situations not before the Court." Broadrick V. Oklahoma, 413 U.S. 601, 610, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). A corollary rule is that constitutional rights are personal and may not be asserted vicariously. These principles reflect "the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." ~., 413 U.S. at 610-611. In accordance with these principles, this Court must consider whether there is some construction of the statute embodying the "Don't Ask, Don't Tell" policy that is constitutional. Meinhold, 34 F.3d at 1476-79.

Under the statute, a servicemember's statement "that he or she is a homosexual or bisexual, or words to that effect, triggers a presumption that he or she engages in or has the intent or propensity to engage in prohibited homosexual conduct. The words "homosexual" and "bisexual," however are defined terms "Homosexual" is defined as "a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms 'gay' and 'lesbian'." 10 U.S.C. § 654(f) (1). "Bisexual" is defined as "a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts." 10 U.S.C. ~ 654(f) (2). As evident from their definitions, the words "homosexual" and "bisexual" as used in the statute connote homosexual conduct or a propensity to engage in proscribed homosexual conduct.

The DOD Directive similarly requires that the servicemember's statement concerning homosexuality be tied to prohibited conduct or an intent to engage in such conduct. The DOD Directive provides that a servicemember's statement that he or she "is a homosexual or bisexual, or words to that effect," means "[l]anguage or behavior that a reasonable person would believe was intended to convey the statement that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts." DOD Directive at 1-2. Thus, under the Directive a statement cannot trigger discharge unless it demonstrates an intent or propensity to engage in prohibited homosexual conduct.

The statute and regulations also distinguish identifying oneself as "homosexual or bisexual, or words to that effect" from statements of "homosexual orientation." "Homosexual orientation" is defined in the DOD Directive as "[a)n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts." Given these definitions, the statute and regulations can be reasonably construed as reaching only statements manifesting "a concrete, expressed desire to commit homosexual acts," Meinhold, 34 F.3d at 1479, not statements of homosexual orientation or status alone.

Plaintiff reads the statute as explicitly providing that the mere statement, "I am homosexual" or "I am gay" triggers discharge, which would be constitutionally impermissible under Meinhold. While this is one possible construction of the statute, it ignores the definitional sections and regulations which make actionable only statements, language or acts demonstrating an intent or propensity to engage in prohibited homosexual conduct. Given the definitions in the statute and regulations, § 654(b) (2) '5 reference to statements that "he or she is homosexual or bisexual" can refer only to

statements manifesting an intent or propensity to engage in prohibited conduct. Under this construction, the presumption would not arise from mere statements of orientation, such as "I have a homosexual orientation." Thus, the statute may be construed in a constitutional manner and is facially valid. To the extent the Government has initiated discharge proceedings on the basis of more problematic statements such as "I am homosexual," the proper challenge is on an as-applied, rather than a facial, basis.

The question still remains whether the statute was constitutionally applied to Lt. Watson. The Ninth Circuit has

5 Whether it would be constitutionally proper in a particular case to initiate discharge proceedings based on such a statement would depend on whether the speaker is acknowledging that he or she is "homosexual" as that term is defined by the statute or rather merely expressing his or her orientation. A reasonable constitutional construction of the statute would not permit the presumption to be created by the statement, "I am homosexual" alone unless it was clear that the speaker was defining himself or herself in accordance with the statutory definition or otherwise manifesting an intent to engage in homosexual acts. The Court need not reach that issue here because Watson's as-applied challenge is limited to his own statements. held that the military may constitutionally discharge members for homosexual conduct, as distinguished from mere status or orientation:

On the merits, we defer to the Navy's judgment that the presence of persons who engage in homosexual conduct, or who demonstrate a propensity to engage in homosexual conduct by their statements, impairs the accomplishment of the military mission.

Meinhold, 34 F.3d at 1472 (emphasis added). The Meinhold court held that a service person's statements would justify discharge if such statements showed a concrete, expressed desire or intent to commit homosexual acts. Id. Because homosexual conduct may constitutionally be prohibited, administrative discharges based on propensity or intent to engage in homosexual acts, as evidenced by the servicemembers' statements, do not violate equal protection. Id.; see also Philips v. Perry, 883 F.Supp. 539, 545-46 (W.D. Wash. 1995).

In arguing that his discharge was unconstitutional, plaintiff focuses on his initial statement that he has a "homosexual orientation," and argues that under Meinhold that statement alone cannot constitutionally create a presumption of homosexual conduct. That is true. However, Watson's statement was not limited to a declaration of his homosexual orientation. Plaintiff's complete statement was "I have a homosexual orientation. I do not

intend to rebut the presumption." While the first sentence cannot under the statute or regulations, as constitutionally construed, be sufficient to raise the presumption, the second sentence could reasonably be interpreted by the Navy as a statement regarding conduct. Watson's statement that he does not intend to "rebut the presumption" can only refer to the presumption in the statute that "the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." Thus, the Navy could reasonably interpret Watson's statement that he would not rebut the presumption as a statement that the presumption is properly applied to him.

Watson argues that the second sentence of his statement should be given no effect because, among other reasons, it could also be reasonably interpreted as a statement that he did not want his private life scrutinized and therefore would refuse to discuss any personal sexual matters. Watson is correct that his statement is susceptible to that interpretation. However, the appropriate question is whether it was reasonable and rational for the Navy to interpret the statement otherwise. The Court concludes that it was.

Watson also argues that because he merely acknowledged his homosexual "orientation," and it is unconstitutional to attach a presumption of conduct to such a statement, Watson's statement that he would not rebut the presumption is ineffective. Watson's use of the term "orientation" cannot shield him, however, from the effects of making further statements he was not compelled to make. Watson's statement that he would not rebut the presumption could reasonably be understood as a statement that the presumption was properly applied to him. This additional comment puts him on a different footing than if he had limited his statement to orientation alone.

Even if Watson's first statement was read as a mere acknowledgment of orientation, which could not under Meinhold constitutionally trigger the presumption of conduct, his later statement to the Board of Review in which he denied having engaged in any homosexual conduct with any military student or servicemember, and denied engaging in any homosexual conduct during the performance of military duty or while on any military installation, was sufficient to create a presumption that he has engaged in or has an intent to engage in homosexual conduct with non-servicemembers while off base and off duty. Such conduct may be constitutionally prohibited, is expressly proscribed by the regulations, and provides sufficient grounds for separation.

It is well recognized that adverse inferences may properly be drawn from silence by parties in civil cases. Baxter v. Palmigiano, 425 U.S. 308, 319, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976) ("[f]ailure to contest an assertion is considered evidence of acquiescence . . . if it would have been natural under

the circumstances to object to the assertion in question'") . The case most frequently cited for this principle is United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 153-54, 44 S.Ct. 54, 68 L.Ed. 221, 224 (1923), an immigration case, in which Justice Brandeis stated, "Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character. The Court went on to state:

> Conduct is often capable of several interpretations, and caution should be exercised in drawing inferences from it. But there is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak. Deportation proceedings are civil in their nature.

Id.; accord, I.N.S. V. Lopez-Mendoza, 468 U.S. 1032, 1043-44, 104 S.Ct. 3479, 82 L.Ed.2d 778, 789 (1984). The plaintiff contends that Bilokumsky is inapplicable here because it is an immigration case, but the principle has been applied in other civil contexts. See, e.g., Daniels V. Pipefitters' Assn. Local Union No. 597, 983 F.2d 800, 802 (7th Cir. 1993) (an adverse inference could have been drawn from the invocation of the Fifth Amendment in a civil case involving racial discrimination); Cumpiano V. Banco Santander Puerto Rico, 902 F.2d 148, 158 (1st Cir. 1990) (human resource manager's refusal to give employee any reason for termination, other than stating he did not wish to discuss things she already knew, was evidence of the Company's discriminatory animus toward pregnant employee).

Because the Navy could properly draw an adverse inference from Watson's selective omission of any reference to off base, off duty conduct with non-military personnel, there is no

basis for finding the statute was unconstitutionally applied to him. He was not discharged solely for acknowledging his sexual orientation, but rather for making statements manifesting an intent or propensity to engage in proscribed homosexual conduct.

V. Due Process

Watson contends that his discharge based on statements concerning his homosexual orientation violates his right to substantive due process under the Fifth Amendment. Watson argues that the government's goal of force readiness is not rationally related to "a policy that systematically discharges servicemembers regardless of their contribution to force readiness." Plaintiff's Opening Brief at 38 (emphasis in original).

The due process clause of the Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law."

U.S. Const. amend V. The due process clause "contains a substantive component, sometimes referred to as 'substantive due process,' which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them.'" Daniels v. Williams, 474 U.S. 327, 337, 106 S.Ct. 662, 678, 88 L.Ed.2d

Even where presumptions of one fact from evidence of another are codified in civil statutes, such presumptions are upheld where "there is some rational connection between the fact proved and the ultimate fact presumed," and the inference of one fact from proof of another is not "so unreasonable as to be a purely arbitrary mandate." Usery V. Turner Elkhorn Mining Co., 428 U.S. 1, 28, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976). There is no basis for finding that the inference drawn by the Navy from Watson's statement was unreasonable or arbitrary.

662, 672 (1986) (Stevens, J., concurring). The substantive due process clause "serves to prevent governmental power from being 'used for purposes of oppression.'" Id. at 331, 106 S.Ct. at 665, 88 L.Ed.2d at 668 (quoting Murray's Lessee V Hoboken Land & Improvement Co., 18 How. 272, 277, 15 L.Ed. 372 (1856)) Although courts approach equal protection and due process analyses differently, there are similarities in the doctrines:

> When conduct, either by virtue of its inadequate foundation in the continuing traditions of our society or for some other reason, such as lack of connection with interests recognized as private and protected, is subject to some government regulation, then analysis under the substantive due process clause proceeds in much the same way as analysis under the lowest tier of equal protection scrutiny. A rational relation to a legitimate government interest will normally suffice to uphold the regulation. At the other extreme, where the government seriously intrudes into matters which lie at the core of interests which deserve due process protection, then the compelling state interest test employed in equal protection cases may be used by the Court to describe the appropriate due process analysis.

Beller, 632 F.2d at 808 (citing Roe v. Wade, 410 U.S. 113, 155, 93 S.Ct. 705, 727, 35 L.Ed.2d 147 (1973); Griswold v. Connecticut, 381 U.S. 479, 497, 85 S.Ct. 1678, 1688, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring); Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed.1655 (1942)). Thus, when a classification penalizes the exercise of a fundamental constitutional right, heightened scrutiny is required. Reno v. Flores, 507 U.S. 292, 113 S.Ct.1439, 123 L.Ed.2d 1, 16 (1993); High Tech Gays, 895 F.2d at 572. On the other hand, where a regulation impairs a lesser interest, there need only be a rational relationship between the challenged regulation and a

legitimate governmental purpose. Flores, 123 L.Ed.2d at 18. Because the Supreme Court has held that there is no fundamental right to engage in homosexual conduct, Hardwick, 478 U.S. 186, the policy must be upheld if there is a rational relationship between the policy and a legitimate governmental purpose.

Plaintiff's substantive due process claim rises and falls with his equal protection claim because they both require a rational relationship between the policy and the government's interest. Under Meinhold, discharge for homosexual conduct or for statements evidencing an intent or propensity to engage in homosexual conduct is constitutionally permissible. As a result, plaintiff's substantive due process claim must be rejected for the same reasons his equal protection claim fails.

VI. First Amendment

Watson contends that the policy and regulations violate his rights of freedom of speech and association as guaranteed him by the First Amendment, both on its face and as applied to him in particular. The plaintiff claims that the policy infringes on the First Amendment because it is a content-based restriction on speech. He further argues that because the "Don't Ask, Don't Tell" policy is explicitly aimed at silencing certain kinds of speech, it is presumptively invalid and the government has a much higher burden to justify this policy under the First Amendment than it did to justify the former policy at issue in Pruitt, which was found not to violate the First Amendment.

Lt. Watson all but ignores that First Amendment 3 challenges of military regulations are subject to a different analysis than those brought in a civilian context. [1] 'The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.' Goldman, 475 U.S. at 507.

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission require a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

Parker v. Levy, 417 U.S. 733, 758, 94 S.Ct. 2547, 41 L.Ed.2d 439, 459 (1974). Thus, "[judicial] review of military 18 regulations challenged on First Amendment grounds is far more deferential than constitutional review of

similar laws or regulations designed for civilian society. Goldman, 475 U.S.21 at 508.

Applying principles of military deference, the Supreme Court has upheld an Air Force regulation that precluded an Orthodox Jew and ordained rabbi from wearing a yarmulke ("the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations"); Goldman, 475 U.S. 503; upheld articles of the Uniform Code of Military Justice punishing an Army officer for making public statements urging African-American servicemembers not to go to Vietnam if ordered to do so; Parker, 417 U.S. 733; and upheld United States Air Force regulations requiring servicemembers to obtain approval from their commanders before circulating petitions to Members of Congress; Brown v. Glines, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980). The lesson of these cases is that the servicemember's interests in autonomy, self-identity, and political expression are subordinate to the interest of the military in good order and discipline, morale, unit cohesion, and combat readiness.

The military's "Don't Ask, Don't Tell" policy is not facially invalid on First Amendment grounds. There is no question that the policy affects speech and inhibits speech to a limited extent. But the policy does not seek to punish speech itself but rather uses speech as evidence of intent or propensity to engage in conduct that the military may constitutionally prohibit. As a result, the policy affects speech "only incidentally, in the course of pursuing other legitimate goals. Ben-Shalom v. Marsh, 881 F.2d 454, 462 (7th Cir. 1989), cert. denied, 494 U.S. 1004, 110 S.Ct. 1296, 108 L.Ed.2d 473 (1990). See also Richenberg, 909 F.Supp. at 1310.

The Ninth Circuit has consistently held that military regulations requiring discharge of servicemembers who merely state their homosexuality do not implicate First Amendment concerns. Courts have reasoned that the servicemember is not being discharged for his or her speech, but rather for his or her status as a homosexual. See Pruitt 963 F.2d at 1163-64; Schowengerdt v. United States, 944 F.2d 483, 489 (9th Cir. 1991), cert. denied, 503 U.S. 951, 112 S.Ct. 1514, 117 L.Ed.2d 650 (1992). See also Philips, 883 F.Supp. at 547. Admissions of homosexuality, 'ike most admissions, [are] made in speech, but that does not mean that the first amendment precludes the use of the admission as evidence of the facts admitted." Pruitt, 963 F.2d at 1164.

The Navy's use of Watson's statements does not violate the First Amendment. While the government may not rely on information that would impinge on First Amendment rights if there is no connection between the

information sought and the government's interest, Dawson v. Delaware, 503 U.S. 159, 167, 112 S.Ct. 1093, 1099, 117 L.Ed.2d 309 (1992) , where such a connection does exist, the information may be used even though communicated by speech or expressive activity. The Supreme Court recently held in the criminal context that "[t] he First Amendment . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." Wisconsin v. Mitchell, 508 U.S. 476, 113 S.Ct. 2194, 2201, 124 L.Ed.2d 436 (1993). As the district court in Thomasson v. Perry, 895 F.Supp. 820, 824 (E.D. Va. 1995), noted, if this holds true in the criminal context, it is certainly applicable in the civil context, where the litigantis not afforded the same constitutional protections as a criminal defendant. Here, the Navy reasonably construed Watson's statements as demonstrating a propensity or intent to commit prohibited homosexual acts. As a result, his discharge was based on evidence of conduct, not speech, and the First Amendment is not implicated.

Conclusion

Because the Navy could properly infer from Watson's statements that he had engaged in or had an intent or propensity to engage in homosexual conduct, his constitutional rights were not violated by his discharge from military service.

IT IS SO ORDERED.

The Clerk of the Court is directed to send uncertified copies of this order to all counsel of record.

DATED this 6th day of March, 1996.

/S/

THOMAS S. ZILLY
UNITED STATES
DISTRICT JUDGE

APPENDIX N

UNITED STATES DISTRICT COURT
Western District of Washington

JUDGMENT IN A CIVIL CASE

LIEUTENANT RICHARD P. WATSON CASE NUMBER: **C95-1141Z**

V.

WILLIAM J. PERRY, et al.

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT

Judgment is hereby entered in favor of defendants on all claims. Dismissal of Claim IV shall be without prejudice.

BRUCE RIFKIN, Clerk

March 21, 1996
Date

By /S/
Casey Condon
Deputy Clerk

FILED
NOV 25 1998
CLERK

No. 98-500

In the Supreme Court of the United States

OCTOBER TERM, 1998

ANDREW HOLMES, ET AL., PETITIONERS

v.

CALIFORNIA ARMY NATIONAL GUARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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1588

QUESTION PRESENTED

The Act of Congress governing homosexual conduct in the military, 10 U.S.C. 654, requires separation of members who, like petitioners, state that they are homosexuals and fail to rebut the presumption arising from that statement that they have engaged in, or have a propensity to engage in, homosexual acts. The question presented is:

Whether 10 U.S.C. 654 and petitioners' discharges under it are consistent with equal protection and the First Amendment.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 124 F.3d 1126. The opinions of the district courts (Pet. App. 25a-42a and 43a-78a) are reported at 918 F. Supp 1403 and 920 F. Supp. 1510.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1997. A petition for rehearing was denied on April 6, 1998 (Pet. App. 25a). Petitioners filed a petition for a writ of certiorari on July 6, 1998 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In enacting 10 U.S.C. 654 (Pet. App. 84a-87a), which governs homosexual conduct in the military, Congress found that the longstanding "prohibition against homosexual conduct * * * continues to be necessary in the unique circumstances of military service." 10 U.S.C. 654(a)(13) (Pet. App. 85a). Congress also determined (10 U.S.C. 654(a)(15); Pet. App. 85a):

> The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

Accordingly, the Act provides for separation from service if a member has: (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act"; (2) "stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts"; or (3) "married or attempted to marry a person known to be of the same biological sex." 10 U.S.C. 654(b)(1)-(3); Pet. App. 86a.[1]

---

[1] The Act defines "homosexual act" as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)." 10 U.S.C. 654(f)(3); Pet. App. 87a.

2. Pursuant to statutory provisions for the issuance of implementing regulations and procedures, the Department of Defense promulgated several directives to govern separations under the Act. DoD Directive No. 1332.30 (Pet. App. 88a-110a), applicable to officers, governs this case, and a substantially similar directive, DoD Directive No. 1332.14, applies to enlisted personnel. To implement the "statements" provision of the Act (10 U.S.C. 654(b)(2)), DoD Directive No. 1332.30 provides that a statement by an officer that he "is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." DoD Dir. No. 1332.30 ¶ C.1.b; Pet. App. 95a. The officer is "given the opportunity to rebut the presumption by presenting evidence" to an administrative board "demonstrating that he * * * does not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts." *Ibid.*

A "[p]ropensity to engage in homosexual acts" is defined as "more than an abstract preference or desire to engage in homosexual acts; it indicates a *likelihood* that a person engages in or will engage in homosexual acts." DoD Dir. No. 1332.30, Defs. ¶ 13; Pet. App. 92a (emphasis added). By contrast, sexual orientation —defined as "[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts" (DoD Dir. No. 1332.30, Defs. ¶ 16; Pet. App. 92a)—"is considered a personal and private matter, and is not a bar to continued service * * * unless manifested by homosexual

conduct." DoD Dir. No. 1332.30 ¶ C; Pet. App. 94a.[2] An officer's statement that he is a homosexual "is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts." DoD Dir. No. 1332.30 ¶ C; Pet. App. 94a. The Directive also sets forth the types of evidence an officer may offer to rebut the presumption. DoD Dir. No. 1332.30 ¶ C.1.b; Pet. App. 95a.

3. Lieutenants Holmes and Watson were ordered discharged from the Army National Guard and the Navy respectively based on their statements that they were homosexuals, or words to that effect, and their failure to rebut the presumption arising from their statements that they engage in, or are likely to engage in, homosexual acts. Pet. App. 7a-9a. They brought separate actions challenging their discharges, arguing, as relevant here, that 10 U.S.C. 654(b)(2) violated their rights to equal protection and to freedom of speech under the First Amendment.

The District Court for the Northern District of California entered summary judgment for Holmes, holding that Section 654 violated equal protection and the First Amendment. Pet. App. 81a. Specifically, the court held that the presumption in Section 654(b)(2), which is triggered by a statement of homosexual orientation, unconstitutionally punished Holmes for speech and for status as a homosexual, rather than for

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[2] "Homosexual conduct" is defined by the directive as "a homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage." DoD Dir. No. 1332.30, Defs. ¶ 9; Pet. App. 92a.

conduct. Pet. App. 64a-80a. The Government appealed.[3]

The District Court for the Western District of Washington rejected Watson's claims and entered summary judgment for the government. Pet. App. 45a. The court held that the military's policy, on its face, did not violate equal protection or the First Amendment because it was based on a likelihood of validly proscribable homosexual acts that is reasonably inferred from a service member's statements. *Id.* at 35a-39a, 45a. The court also rejected Watson's as-applied challenge, finding that Watson's statements manifested an intent or propensity—which Watson failed to rebut—to engage in off-base, off-duty homosexual acts with nonmilitary personnel. *Id.* at 39a-42a, 45a. Watson appealed.[4]

4. The Ninth Circuit consolidated the two cases on appeal and upheld the constitutionality of the statutory policy. Regarding equal protection, the court observed that court of appeals precedent firmly establishes that the military has a "legitimate interest" in excluding service members who engage in homosexual acts "in order to maintain effective armed forces." Pet. App. 13a. The court then held that Congress acted rationally in presuming that a declared homosexual engages in, or likely will engage in, homosexual acts. *Id.* at 15a-16a. The court found that the policy provides service members

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[3] Although the district court ordered that Holmes be reinstated, Holmes stipulated that he would not seek reinstatement pending appeal. Pet. App. 10a.

[4] Until recently, Watson served on active duty pursuant to an injunctive order. Pet. App. 8a. However, by order dated August 18, 1998, the Ninth Circuit vacated the injunctive order without prejudice to Watson's litigative rights, and Watson received an honorable discharge on September 1, 1998.

with a meaningful opportunity to rebut the presumption of homosexual acts. *Id.* at 16a-17a.

Thus, the court held, petitioners' statements of homosexuality did not automatically lead to their discharges; rather, their statements were "coupled with their tacit acceptance of the link between their orientation and their conduct, as evidenced by their failure to show" that they did not engage in, and were not likely to engage in, homosexual acts. Pet. App. 16a. The Ninth Circuit therefore held that the challenged statutory classification did not offend equal protection, because it was based on a reasonable inference of homosexual acts that are validly prohibited in the special military context. *Ibid.*

The Ninth Circuit also sustained the policy against petitioners' First Amendment challenge, holding that because petitioners were "discharged for their conduct and not for speech, the First Amendment is not implicated." Pet. App. 18a. The court explained that petitioners' statements that they are homosexuals, "like most admissions, w[ere] made in speech, but that does not mean that the [F]irst [A]mendment precludes the use of the admission[s] as evidence of the facts admitted." *Ibid.* (quoting *Pruitt* v. *Cheney*, 963 F.2d 1160, 1164 (9th Cir. 1991), cert. denied, 506 U.S. 1020 (1992)).[5]

5. The Ninth Circuit then denied petitioners' joint petition for rehearing and rejected their suggestion of rehearing en banc. Pet. App. 25a-26a. Five judges

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[5] Judge Reinhardt dissented. Pet. App. 18a-24a. In his view, the policy, "while purporting to allow homosexuals to serve in this country's armed forces, unconstitutionally conditions their service on an abridgment of their free speech rights under the First Amendment." Pet. App. 24a.

dissented from the denial of rehearing en banc. *Id.* at 26a.

ARGUMENT

The decision below is correct and in accord with the decisions of the three other courts of appeals that have considered the validity of the Act of Congress governing homosexual conduct in the military.[6] See *Thomasson* v. *Perry*, 80 F.3d 915 (4th Cir.) (en banc), cert. denied, 519 U.S. 948 (1996); *Selland* v. *Perry*, 905 F. Supp. 260 (D. Md. 1995), aff'd, 100 F.3d 950 (4th Cir. 1996) (Table), cert. denied, 520 U.S. 1210 (1997); *Richenberg* v. *Perry*, 97 F.3d 256 (8th Cir. 1996), cert. denied, 118 S. Ct. 45 (1997); *Able* v. *United States*, 88 F.3d 1280 (2d Cir. 1996) (sustaining Act against First Amendment and equal protection challenge, provided its underlying prohibition of homosexual acts is valid); after remand, *Able* v. *United States*, 153 F.3d 628 (2d Cir. 1998) (sustaining Act's prohibition of homosexual acts), petition for reh'g pending, No. 97-6205; *Philips* v. *Perry*, 106 F.3d 1420 (9th Cir. 1997) (sustaining Act's prohibition of homosexual acts); *Thorne* v. *Department of Defense*, 139 F.3d 893 (4th Cir. 1997), cert. denied, No. 98-91 (Oct. 19, 1998). This Court recently denied certiorari in four of those cases (*Thomasson*, *Selland*, *Richenberg* and *Thorne*), all of which presented First Amendment and equal protection issues similar to those presented in this case. There has been no change in circumstances that would warrant a different result

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[6] Petitioners erroneously state (Pet. 10) that only "two circuits" have upheld 10 U.S.C. 654. As shown above, four circuits—the Second, Fourth, Eighth, and Ninth Circuits—have sustained the constitutionality of the Act of Congress governing homosexual conduct in the military.

here. Accordingly, the petition for a writ of certiorari should be denied.

1. The Ninth Circuit correctly rejected petitioners' argument (Pet. 11-18) that 10 U.S.C. 654 and its implementing directive violate equal protection. In sustaining the validity of the military's acts-directed policy, the decision below comports with nearly twenty years of precedent in which that court and every other court of appeals to consider the issue have upheld the constitutionality of the military's authority to discharge service members who engage in homosexual acts. Pet. App. 13a. Contrary to petitioners' contention (Pet. 11-13), the Ninth Circuit did not err in deferring to the judgment of the Legislative and Executive Branches, as well as military leaders, that service members with a propensity or intent to engage in homosexual acts should also be excluded as a means of fostering the legitimate aims of maintaining unit cohesion, protecting privacy interests, and minimizing sexual tensions. Pet. App. 3a-6a. This Court repeatedly has held that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules for their governance is challenged." *Goldman* v. *Weinberger*, 475 U.S. 503, 508 (1986). Deference is especially warranted here, where "the challenged restriction and its constitutionality [were] extensively considered by Congress in hearings, committee and floor debate." *Philips* v. *Perry*, 106 F.3d at 1425 (citing *Rostker* v. *Goldberg*, 453 U.S. 57, 64, 72 (1981)). Additionally, the judiciary must "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Goldman*, 475 U.S. at 507. Thus, in considering the validity of 10 U.S.C. 654, the Ninth Circuit —quite correctly—was

"particularly careful not to substitute [its] judgment of what is desirable for that of Congress, or [its] own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Rostker*, 453 U.S. at 68.

Given the legitimate statutory aims, furthered by 10 U.S.C. 654, of promoting unit cohesion, accommodating personal privacy, and reducing sexual tension among service members, the Ninth Circuit correctly rejected (Pet. App. 13a) the same argument that petitioners make here—namely, that the Act is impermissibly based on invidious or irrational prejudice (Pet. 14). As the court held in *Philips*, "[w]e cannot say that the [military's] concerns are based on 'mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable' by the military. Nor can we say that avoiding sexual tensions lacks any 'footing in the realities' of the [military] environment." 106 F.3d at 1429 (citations omitted). The Second, Fourth, and Eighth Circuits have similarly rejected the argument that the Act is based on impermissible prejudice. *Able*, 155 F.3d at 634-636; *Thomasson*, 80 F.3d at 927-931; *Richenberg*, 97 F.3d at 261.

Petitioners err in asserting (Pet. 17) that the Act is irrational in presuming, subject to rebuttal, that a service member who declares that he is a homosexual has a propensity to engage in homosexual acts. The Ninth Circuit correctly held that "it is rational to assume that both homosexuals and heterosexuals are likely to act in accordance with their sexual drives." Pet. App. 15a-16a (quoting *Richenberg*, 97 F.3d at 262, and *Steffan* v. *Perry*, 41 F.3d 677, 692 (D.C. Cir. 1994) (en banc)) (internal quotation marks omitted). Accord *Able*, 88 F.3d at 1296; *Thomasson*, 80 F.3d at 930. That the policy accords a member a meaningful opportunity to rebut the presumption (Pet. App. 16a-17a) renders

the policy all the more fair and confirms that it is acts-directed.[7]

Finally, petitioners' reliance (Pet. 15) on *Romer* v. *Evans*, 517 U.S. 620 (1996), is misplaced because there are at least four important distinctions between Amendment 2 to the Colorado Constitution at issue in *Romer* and the Act of Congress challenged here. First, 10 U.S.C. 654, which concerns military service by persons who engage in homosexual conduct, is much narrower in scope than Colorado's Amendment 2, which this Court described as a "sweeping" and "unprecedented" measure that withdrew from homosexuals the "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society," so much so as to "deem a class of persons a stranger to its laws." 517 U.S. at 627, 631, 633, 635. Second, *Romer* arose in the civilian context and does not affect precedents, such as *Parker* v. *Levy*, 417 U.S. 733, 756 (1974), holding that "Congress is permitted to legislate both with greater breadth and with greater flexibility" in the military context. See *Rostker* v. *Goldberg*, *supra* (sustaining men-only draft law). Third, Colorado's Amendment 2

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[7] Contrary to petitioners' contention (Pet. 17), *Robinson* v. *California*, 370 U.S. 660 (1962), *Powell* v. *Texas*, 392 U.S. 514 (1968), and *Jacobson* v. *United States*, 503 U.S. 540 (1992), do not cast doubt on the validity of the presumption. Those cases involved presumptions arising from a defendant's status in the context of *criminal* proceedings, where "[p]unishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual." *Powell*, 392 U.S. at 543 (Black, J., concurring). Section 654, in contrast, involves an administrative separation from the military, which is not a criminal proceeding and does not impose punishment. See *Garret* v. *Lehman*, 751 F.2d 997, 1002-1003 (9th Cir. 1985).

classified on the basis of homosexual status (517 U.S. at 635), while the Act of Congress at issue here classifies on the basis of past or likely future prohibited homosexual acts. Fourth and most important, the Act challenged here serves the legitimate objectives of prohibiting homosexual acts in the military, promoting unit cohesion, protecting privacy interests, and reducing sexual tensions, while this Court found that Amendment 2 had no legitimate objective. *Ibid.*[8]

2. The court of appeals also correctly held that the Act of Congress governing homosexual conduct in the military is consistent with the First Amendment. The Act treats a service member's statement that he is a homosexual as a basis from which to presume, in the absence of rebuttal by him, that he is a "homosexual" as defined by the Act, *i.e.*, one "who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. 654(f)(1). The Ninth Circuit correctly held (Pet. App. 18a) that the First Amendment does not prohibit such evidentiary use of a service member's statement. *Able*, 88 F.3d at 1292-1300; *Thomasson*, 80 F.3d at 931-934. See *Wayte* v. *United States*, 470 U.S. 598 (1985). Petitioners were afforded the opportunity to rebut the presumption in their administrative hearings, but failed to do so. Pet. App. 16a. In addition, expressive conduct may be restricted in the military context if it is "likely to

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[8] Petitioners' suggestion (Pet. 17) that certiorari should be granted to resolve a conflict between this case and *Meinhold* v. *Department of Defense*, 34 F.3d 1469 (9th Cir. 1994), lacks merit. Certiorari is not warranted to resolve allegedly inconsistent intracircuit decisions. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Moreover, as the Ninth Circuit's analysis plainly shows (Pet. App. 14a, 16a), this case is readily distinguishable from its prior decision in *Meinhold*.

interfere with * * * vital prerequisites for military effectiveness." *Brown* v. *Glines*, 444 U.S. 348, 354 (1980). The express legislative findings supporting the Act of Congress at issue (see 10 U.S.C. 654(a)) show that that test is met here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1998

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No. 98-500

In The

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October Term, 1998

ANDREW HOLMES, ET AL.,

Petitioners,

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CALIFORNIA ARMY NATIONAL GUARD, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS IN REPLY TO RESPONDENTS' OPPOSITION

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14 pp

QUESTIONS PRESENTED

Petitioners seek review of the constitutionality of the federal government's so-called "don't ask, don't tell" policy regarding homosexuality in the armed forces. The questions presented for review are:

I. Does A Policy Which Punishes Members of One Class of Individuals, Admitted Homosexuals, For Identifying Their Sexual Orientation, Violate The Equal Protection Clause?

II. Does The Government's "Don't Ask, Don't Tell" Policy, a Policy Designed to Silence Homosexuals From Identifying Their Status As Homosexuals, Constitute an Unconstitutional Prior Restraint On Speech?

III. Is the Court Required to Accept Legislative Pronouncements That the "Don't Ask, Don't Tell" Policy Regulates "Conduct" Rather Than "Status" or "Speech," In The Face Of Overwhelming Evidence That The Policy Was Designed To, And Does, Impermissibly Regulate "Status" and "Speech."?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 124 F.3d 1126. The opinions of the district courts (Pet. App. 25a-42a and 43a-78a) are reported at 918 F.Supp. 1403 and 920 F.Supp. 1510.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1997; petition for rehearing was denied on April 6, 1998. (Pet. App. 25a). Petitioners' petition for a writ of certiorari was filed on July 6, 1998. Respondents' brief in opposition to the writ was filed in November 1998. The jurisdiction of this Court is invoked under 28 United States Code section 1254(1).

STATEMENT IN REPLY

1. In support of their petition for a writ of certiorari, petitioners Andrew Holmes (U.S. Army, First Lieutenant) and Richard P. Watson (U.S. Navy, Lieutenant) summarized application of the "don't ask, don't tell policy," codified at 10 United States Code section 654 (the "Policy"), and demonstrated the Policy's intended application to a particular category of servicemembers: those who say they are homosexual. Once known to be homosexual, the full apparatus of the Policy is brought to bear on the servicemember. Unless the servicemember convincingly repudiates his or her homosexuality (as defined by the Policy), he or she is discharged. Petitioners showed that the Policy was drafted and operates in deference to the feared reactions of those servicemembers who do not want homosexuals in their midst.

2. Petitioners also demonstrated in their petition that the "conduct" jargon cloaking the governments'

arguments in support of the Policy is a drafting contrivance intended by the Policy authors to impede (or complicate) court intervention. "Conduct," they gathered, could be constitutionally regulated, while "status" (and most assuredly "speech" about "status") could not be. Born of this is the government's position that the Policy is "acts-directed," a point that infuses every argument the government makes in support of the Policy. "Conduct" (or "acts") is also the critical linchpin cited by each of the Circuits in upholding the Policy, all holding that the government may constitutionally regulate homosexual *conduct*. This is tacit acknowledgment that the Policy cannot survive constitutional scrutiny without "conduct" as the basis for its existence.

3. Petitioners demonstrated how "conduct" was injected into the Policy as a drafting contrivance, employed to obscure the actual purpose of the policy: to root out homosexuals who become *known* to their fellow servicemembers by their statements of orientation ("I am homosexual"). Rooting out homosexuals who become known is the paramount goal of the Policy, and it is this goal that explains the Policy's proffered justifications: it is the *known* homosexual who theoretically compromises "unit cohesion," creates "privacy concerns," and causes "sexual tension." The constitutional flaw is that these are *all* prejudice-driven fears, unambiguously forbidden to the government as a motive or basis for legislation. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). It is not the known homosexual who creates the hypothetical disruptions, it is *the anticipated adverse reactions of others* that creates it.

4. In a further showing that the Policy is aimed at known homosexuals and not at "conduct" or "acts," petitioners introduced the Department of Defense's own study of homosexual discharges, released in April 1998.

The study admitted the irrelevance of actual "conduct" in effecting Policy-based discharges. Belying the notion argued here that the Policy targets only "conduct" and is constitutional for that reason, the study itself distinguished "statements" cases from "conduct" cases, and emphasized that cases involving actual "conduct" are only a "very small percentage" of all Policy-based homosexual discharges. Pet. 7, citing *Report to the Secretary of Defense: Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military,* Office of the Under Secretary of Defense (Personnel and Readiness), April 1998 ("Report"), at page 2 (Pet. App. 130a). According to the Report, the vast majority of discharges were "statements" cases – the servicemember was discharged not because he or she engaged in "conduct," but rather because his or her homosexuality became *known* as the result of a statement of orientation. The government's opposition does not address the Report; nor has any Circuit who has considered the Policy.

5. Petitioners also showed that if "conduct" or "acts" were the actual concern of Congress, the Policy would be unnecessary. The Uniform Code of Military Justice, the most comprehensive penal code in our nation, extensively regulates servicemember behavior and prohibits the very acts at which the Policy is presumed to be aimed: sodomy (of any variety), adultery, all sexual assaults, catch-all "indecent acts," and fraternization. The Code does so even-handedly and without distinction between homosexual and heterosexual acts. Be it overtly sexual (an act such as sodomy) or non-sexual (an act such as fraternization), there is no "homosexual act" that is not covered by the Code. As a measure aimed at the prevention of "acts," the Policy is redundant and unnecessary.

Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997) (Fletcher, J., dissenting).

It is also imprecise. By the government's own Report, the super-majority of those discharged under the Policy do not engage in the type of behavior at which the Policy is ostensibly aimed: "acts." Rather, mere "statements" are the most common basis for discharge. Though self-evidently anomalous, the Report states the point in reassuring tones, saying: "It bears mentioning that, notwithstanding the recent increases [in overall homosexual discharges], the number of discharges for homosexual *conduct* is a very small percentage of total discharges." Pet. 8, citing the Report at Pet. App. 132a.

6. Petitioners also showed that the current Policy is barely different from its predecessor policy, one that was repeatedly found by the Circuits to be a status-based classification, notwithstanding vigorous government argument (as here) that it was conduct-driven. *See, e.g., Meinhold v. U.S. Department of Defense*, 34 F.3d 1469, 1477 (9th Cir. 1994), citing *DoD Directive* 1332.14(H)(1)(a). In *Pruitt v. Cheney*, the predecessor policy was held to be a status-based prohibition against service by homosexuals. *Pruitt v. Cheney*, 963 F.2d 1160, 1165 (9th Cir. 1991), distinguishing *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905. In *Meinhold*, the Ninth Circuit held that equal protection was clearly implicated since the predecessor policy applied to the "classification of being homosexual," *Meinhold*, 34 F.3d at 1477, notwithstanding that it purported to reach only "conduct." *See, e.g., Watkins v. United States*, 875 F.2d 699, 714 (9th Cir. 1989) (Norris, J., concurring) (rejecting government argument that "conduct" was basis for predecessor policy). Under the current Policy, "homosexual acts" are defined as they were under the predecessor policy. Under both,

the "propensity" presumption is applied to the words "I am a homosexual."

Thus, whether under the old policy or the current Policy, no member who utters the words "I am a homosexual" can remain in the service unless he rebuts the clear meaning of the words. The current Policy's threshold recitation that homosexuality is not a bar to service has no meaning whatsoever, and the Policy therefore contains the same flaw as its predecessor: it is a regulation based on the classification of being a homosexual, since it is only by renouncing that status (as defined) that the servicemember avoids discharge.

7. The sum and substance of this sequence is that the Policy is not about "acts," and, by admission of the government, is only rarely applied to "acts." Rather, "conduct" is the contrivance that permits the government to serve an end prohibited to it: rooting out homosexuals who become known, in deference to the hypothetical adverse reactions of others.

ARGUMENT IN REPLY

1. Though the Policy's premise is that sexuality is private and that homosexuals can serve, it abrogates the premise by prohibiting the homosexual from *stating* that he or she is homosexual. The homosexual, therefore, is not a perceived threat because he or she has "acted" or "engaged in conduct." Rather, he becomes a threat only after he has become *known to others* as a homosexual. The known homosexual, to avoid discharge, must then convincingly repudiate this orientation and show that he or she does not have the propensity to engage in homosexual "acts." The circle is complete, for it is this propensity that, under the Policy, defines a homosexual. This is, plainly, a status-based classification drawn in deference to the feared reactions of others.

In order to draft around this obvious motive, the Policy infuses simple statements of orientation, literal and comprehensible, with entirely new meaning. Under the Policy, "I am a homosexual" means "I intend to engage in acts." This is a forced and unconstitutional transformation in which an *admission of an orientation that is supposedly permitted* becomes an *admission of conduct that is prohibited*. (Justice Reinhardt, dissenting below, was particularly critical of this "disingenuous and arbitrary" feature of the Policy. Pet. App. 22a.)

The Court cannot countenance a Policy whose operation rests entirely upon such disingenuous semantics. As the government argues and the Circuits have found, the constitutionality of the Policy is entirely dependent upon its tie to "conduct." Eliminate the tie (such as by showing it to be a contrivance), and the basis for the Policy's constitutionality is gone. With conduct gone, what remains of the Policy is a prohibition against service by known homosexuals, a status-based classification that takes aim at a disfavored group, and then discharges the group member from service unless he renounces his status as a member of the disfavored group. No modern-era decision of this Court has tolerated such a statute. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), *Palmore v. Sidoti*, 466 U.S. 429 (1984).

2. Even if the Court were disinclined to find the conduct ingredient a contrivance, it could choose to construe the Policy so as to avoid the constitutional question. This was the path chosen by the *Meinhold* court in its 1994 consideration of the predecessor (nearly identical) policy. The servicemember's discharge followed his statement of orientation. The court blocked the discharge and held that the predecessor policy could be constitutionally applied if the discharge was based upon something more than a declaration of orientation. The court held that such

a statement was one which would indicate a "concrete, expressed desire [by the speaker] to commit homosexual acts which are, in turn, prohibited." *Meinhold*, 34 F.3d at 1479. The words "I am a homosexual" do not have this effect, the court held. *Id.*

If indeed homosexuality is not a bar to service, and if indeed it is merely "conduct" at which the Policy is aimed, then a construction that requires a *genuine* "conduct" ingredient in the discharge decision addresses the armed forces' insistence that *only* "conduct" is of concern.

3. The government has never argued for this construction, since it would risk continued military service by *known* homosexuals. The government never phrases the tension in this way, choosing to rest on abstractions such as "unit cohesion," "privacy," or "sexual tension." Yet it is obvious that these are concerns only because some in military society dislike homosexuals. The Policy gives voice to this segment of military society.

"Deference" in such a context is not at is apogee, for the "military judgment" in this instance has nothing to do with war tactics, armaments, uniforms, or actual threats to security. The government rests heavily on the deference formulation in *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986), where the Court stated that "judicial deference is at its apogee" when congressional authority to "raise and support armies and make rules for their governance" is challenged. *Goldman*, 475 U.S. at 508. This formulation of deference, while applicable to distinctively military judgments, has no application whatsoever when the judgment at issue is one which seeks to classify humans based on a revealed trait that others dislike. No case decided by this Court has extended "deference" so far.

No legitimate military expertise is implicated by a Policy whose goal is to cater to the theoretical bad reactions of some soldiers to other soldiers. Past military judgments of this kind have been repeatedly repudiated as odious, most notably in the services' segregation of black Americans, which the armed forces defended by employing language identical to that employed now:

> [T]he close and intimate conditions of life aboard ship, the necessity for the highest possible degree or unity and esprit de corps, the requirement of morale, all these demand that nothing be done which may adversely affect the situation. Past experience has shown irrefutably that the enlistment of Negroes other than for mess attendance leads to disruptive and undermining conditions.

Pet. App. 120a. It is not difficult to conclude that the sincere vigor with which this argument was offered in 1941 is not unlike the sincere vigor with which the identical argument is offered today in support of the Policy. In the classification of human beings who may be disliked by some in society, the military's judgments are entitled only to *extremely limited deference.* The Policy cannot survive *City of Cleburne v. Cleburne Living Center* and *Palmore v. Sidoti:* "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *City of Cleburne,* 473 U.S. at 448, *citing Palmore,* 466 U.S. at 433. There is no "military exemption." Deference cannot provide the basis for a law which gives effect to private biases.

4. The Policy provides a basis for this Court to link *City of Cleburne* and *Romer v. Evans.* The clear mandate of each case is to forbid, even at the lowest level of review, legislation drawn in deference to the "private biases" of others. *Romer* was the most recent expression of this fixture of Supreme Court jurisprudence: statutes born of

dislike, intolerance, unease, or any other shading of prejudice, are presumptively irrational and, hence, unconstitutional.[1]

5. Even if prejudice were not primarily animating this Policy, and the prevention of "acts" its actual and primary goal, the means chosen are not rationally related to the end sought to be achieved. A statute which states as its end the "prevention of acts" but which then reaches such instances in only a "small percentage" of cases is not rational and fails the second step of rational basis review.

6. The government argues that the Circuits' acceptance of the Policy is enough to bar review by the Court. If indeed petitioners' analysis is constitutionally sound, then the contrary actions of inferior courts are irrelevant.

7. Finally, the strained analyses born of this disingenuous Policy are just as pronounced in evaluating it from a First Amendment standpoint. Declaring as a Policy premise that "homosexuality is not a bar to service" would seem to authorize servicemember honesty about his or her orientation. But this is not so. Again Justice Reinhardt:

> The tenuous connection the government seeks to draw between speech and propensity (and then between propensity and conduct) cannot withstand scrutiny under the First Amendment. The difference between being a homosexual and

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[1] The government's reply brief suggests that the Ninth Circuit *in this case* addressed petitioners' argument that the Policy is rooted in prejudice. Rep. 9. It did not. In *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997), the Circuit addressed the "conduct" prong of the Policy, explicitly did not address the "statements" prong, and stated that where "conduct" is genuinely present, the military's hypothetical fears may be warranted. (The *Philips* servicemember admitted to "conduct.") In the instant case, a "statements" case, the Ninth Circuit did not consider the presence or absence of prejudice *at all*.

> saying one is a homosexual is precisely that – one has said what is a fact. The presumption that one who speaks truthfully is more likely to engage in prohibited conduct than one who conceals or lies about his homosexual status is plainly unsupportable. . . . There is simply no rational basis for the presumption that those who are honest have a greater propensity to commit homosexual acts than those who prefer to hide their sexual proclivities.

Pet.App. 22a.

CONCLUSION

The entirety of the Policy is a facade for unconstitutional rule-making. Its premise is false. Homosexuals are not welcome. They are subject to discharge the instant they become known. This Policy is not about "conduct" or "acts" or their prevention, shown by its contrived phrasing and its actual application. Rather, it is about deferring to the feared reactions of those who may be offended to learn that a homosexual is serving in their midst. The government's opposition brief mentions, then unpersuasively disposes of this critical point: were it not for deep-seated and historic service antagonism toward homosexuals, the Policy would not exist. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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